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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF AUBURN, a municipal corporation of the State of Washington,

Petitioner,

v.

THE UNITED STATES GOVERNMENT and THE SURFACE TRANSPORTATION BOARD, an agency of the United States Government; KING COUNTY, a Washington municipal corporation; BURLINGTON NORTHERN SANTA FE CORPORATION, a Delaware corporation; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation; BURLINGTON NORTHERN SANTA FE ACQUISITION, INC.; and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the legislative history shows that Congress had only intended to occupy the entire field of *economic* regulation of the interstate rail transportation system, and that the states would still retain "the police powers reserved by the Constitution:"

Does the Interstate Commerce Commission Termination Act, which went into effect January, 1996, preempt all traditional state police powers, including environmental review and permit authority?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the City of Yakima, Washington and the City of Kent, Washington were parties before the Court of Appeals, but reached settlement prior to issuance of the Ninth Circuit decision.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *City of Auburn v. United States Government and the Surface Transportation Board*, 154 F.3d 1025 (9th Cir. 1998). (Appendix A).

STATEMENT OF JURISDICTION

The Court of Appeals opinion was filed September 3, 1998, and amended October 20, 1998. An order denying a petition for rehearing and rejecting a suggestion for rehearing *en banc* was filed on December 22, 1998. (Appendix E). This Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute involved is the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 701, *et seq.* The relevant portions are in Appendix F.

STATEMENT OF THE CASE

This Petition concerns a decision by the United States Court of Appeals for the Ninth Circuit in three related cases, consolidated for argument and decision, concerning rulings of the federal Surface Transportation Board ("STB"), successor to the Interstate Commerce Commission.

Pursuant to the Hobbs Act, 28 U.S.C. § 2342(5), appeal of all STB actions is directly to the Courts of Appeals. The STB decisions reviewed by the Ninth Circuit were issued,

respectively, September 25, 1996 (Appendix C), October 24, 1996 (Appendix D), and July 1, 1997 (Appendix B). They arise out of a proposal by Burlington Northern Railroad ("Burlington") to acquire the Washington Central Railroad and then to reconstruct and open its Stampede Pass line to provide an additional route across the Cascade Mountains to Western Washington. Burlington anticipated use of the route for double-stacked intermodal trains.

Burlington's Stampede Pass line extends from the City of Auburn in Western Washington's King County to the City of Cle Elum in Eastern Washington's Kittitas County, passing over Stampede Pass in the Cascade Mountains. Burlington effectively eliminated service on the line in approximately 1983, although it was never formally abandoned. Burlington decided to reopen the Stampede Pass line in early 1996. Because the line had been in disuse for close to 15 years, the reopening required — in Burlington's words — "major construction," including replacement of track sidings, new maintenance buildings, improvements to an approximately two-mile-long tunnel through the Cascade Mountains (including raising tunnel heights and replacing snow sheds), and installation of new communications towers.

Petitioner City of Auburn is located at the western terminus of the Stampede Pass line, at its junction with Burlington's north-south Pacific Coast rail line, which connects with the Ports of Tacoma and Seattle. Auburn is divided into sectors by Burlington train tracks: the Stampede Pass line east to west, and the Pacific Coast line north to south. All trains traveling through the reopened Stampede Pass line travel through Auburn, switching between the Pacific Coast line and the Stampede Pass line in the middle of downtown Auburn. Burlington has seven at-grade

crossings within the City of Auburn: two for the Stampede Pass line, and five for the Pacific Coast line. Because trains using the rebuilt Stampede Pass are frequently a mile or more long, each train can simultaneously block several at-grade crossings at once in the city, stopping vehicle traffic and creating blocks-long traffic jams.

The City of Auburn has a population of almost 40,000. Its streets are used not only for local access, but as heavily traveled commuter routes between points in King County. The only regional trauma center serving the South King County area is located in Auburn east of Burlington's north-south Pacific Coast line. A Boeing facility employing 9,000 area citizens and a regional shopping mall are located immediately west of the same line.

When Burlington first announced its plans for reopening the Stampede Pass line, it stated that reopening the line would be accompanied by a conversion of its old (largely inactive) rail yard in downtown Auburn into a massive "intermodal" facility. Burlington advised the City that the yard would result in freight truck traffic projected at 3,000 trips per day onto adjacent city streets.

In the first half of 1996, Burlington filed several permit and environmental review applications with the planning departments of both King and Kittitas Counties, where the Stampede Pass line work would take place. Such applications were not unusual: railroads have routinely submitted applications to local jurisdictions and gone through environmental review under the Washington State Environmental Policy Act ("SEPA"), Revised Code of Washington ("RCW") Chapter 43.21C. Burlington also had pending with the City of Auburn a preliminary application

for site planning approval of the intermodal yard in downtown Auburn.

Auburn provided written comments to the two counties handling environmental review and permitting under state law of Burlington's project, detailing the City's concerns about the effect of the work on the Stampede Pass line, as well as the impact of the intermodal yard/truck terminal on city streets and traffic. Auburn also challenged the failure of Kittitas County to prepare an environmental impact statement under SEPA.

Burlington's response to adverse comments by Auburn and others was to withdraw all of its state and local permit applications, relying on an informal opinion issued by the STB Secretary to the effect that the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C § 701, *et seq.*, preempted state and local authority for environmental and land use regulation. In response, after prompting by Auburn and other affected cities, King County petitioned the STB on August 21, 1996, for a formal declaratory ruling on whether the ICCTA preempted local environmental review authority.

The STB issued its decision less than a month later, on September 25, 1996, declaring that state and local environmental laws were preempted. Appendix C. Although Auburn's concerns had been the impetus for the question, the STB's decision summarily rejected Auburn's request to participate in the proceeding. Appendix C at p. 44a n.2. The Board did indicate that the City could attempt to file with the STB a separate petition for declaratory order, even while the decision announcing preemption remained in effect. *Id.*

Auburn filed its own petition on October 11, 1996. The petition asked for a ruling that the ICCTA did not preempt state and local environmental, land use, and building permitting authority. In the alternative, the petition asked that the STB vacate its September 25, 1996, decision in the King County matter, and allow the question of preemption to be settled in a more appropriate forum, for example, on district court review of a claim of preemption in response to a state or local permitting action.

While Auburn's petition was pending, on October 24, 1996, the STB issued its decision approving the Burlington/ Washington Central merger transaction. Appendix D. The approval rejected concerns expressed by Auburn and others about the adequacy of environmental review of the transaction. It endorsed "mitigation measures" which were largely exhortatory — for example, providing a toll-free number to handle inquiries, and requiring Burlington to "consult" with state agencies and "discuss" funding options. Appendix D at 75a, 77a. The STB merger approval decision also emphasized that the STB did not review or regulate impacts or construction not related to the transaction for which STB approval was required. Appendix D at 71a.

On July 1, 1997, the STB issued its decision in response to the Auburn petition. Appendix B. The STB treated Auburn's petition as one for "reconsideration" of its earlier decision, and reaffirmed it, stating "that a state or local permitting process for prior approval of this project, or of any aspect of it related to interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted." Appendix B at p. 31a. In announcing this sweeping preemption, the STB explicitly declined to review any of the individual

ordinances or state or local regulations which it swept aside. *Id.* at p. 31a.

Auburn appealed both STB rulings to the Court of Appeals for the Ninth Circuit. It also appealed the STB's approval of the merger transaction between Burlington Northern and Washington Central on the grounds that the environmental review pursuant to the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4321, had been inadequate. In its appeals, Auburn emphasized its concern that the STB's preemption ruling was too sweeping and too indiscriminate. Auburn pointed out that it could be construed as preempting any state or local review of any railroad activities conceivably related to the Stampede Pass line, including establishment by Burlington of a 3,000-trip-per-day truck terminal in downtown Auburn. Burlington itself had confirmed Auburn's concerns in this regard by submitting a letter to the City withdrawing its request for City review of the terminal proposal, citing the STB decisions. Appendix G.

The Ninth Circuit consolidated all three Hobbs Act appeals for argument. It subsequently issued a decision on the merits on September 3, 1998, which was amended on October 20, 1998, with petition for rehearing and suggestion for rehearing *en banc* denied on December 22, 1998. Appendices A, E.

The Ninth Circuit's decision expansively confirmed the STB's statutory interpretation of sweeping preemption on the premise that the ICCTA, as part of the federal scheme for regulation of railroads, intentionally and explicitly extinguished traditional state police power authority over them, rather than just preempting state *economic* regulation

of them. In articulating this premise, the Ninth Circuit acknowledged Auburn's citations to the ICCTA's legislative history, in which Congress declared more than once that it intended to preempt economic regulation, while preserving the states' traditional police powers. However, it refused to consider this legislative history on the grounds that the ICCTA itself was so clear and unambiguous that resort to the legislative history was unnecessary.

In doing so, the court ignored the context of the statute itself and contradictions which would arise in it if the STB's construction were accepted. Further, it ignored case law both from this Court and from the Ninth Circuit itself suggesting that, in some circumstances, legislative history should inform statutory interpretation even where the statutory language itself is purportedly clear.

The legislative history which the Ninth Circuit declined to credit is substantial. For example, as the court acknowledged (Appendix A at p. 12a), the House Committee responsible for the ICCTA reported as follows:

> Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although states retain the police powers

> reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

H.R. Rep. No. 104-311 at 95-96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08 (underlined emphasis added; italics in original). The House Transportation and Infrastructure Committee also commented on the intent of the ICCTA "to standardize all *economic* regulation" (emphasis added):

> To reflect the replacement of the Staggers Act system of optional certification of State regulatory agencies to administer *economic regulation* of railroads using Federal Standards, this provision is conformed to the bill's direct and general pre-emption of State jurisdiction over *economic regulation* of railroads. As used in this section, "State or Federal law" is intended to encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the Transportation Adjudication Panel. The bill is intended to standardize all *economic regulation (and deregulation)* of rail transportation under Federal law, without the optional delegation of administrative authority to State agencies to enforce Federal standards, as provided in the relevant provisions of the Staggers Rail Act.

H.R. Rep. No. 104-311, at 95 (1995), 1995 U.S.C.C.A.N. at 807 (emphasis added). "The central concern of the Staggers Rail Act," referred to in this House Report, "was reformation of the *economic regulation* of railroads." *Illinois Commerce Commission v. Interstate Commerce Commission*, 879 F.2d 917, 925 and n.66 (D.C. Cir. 1989) (citing Staggers Act legislative history) (emphasis added). As evidenced by the House Committee Report statements quoted above, that focus on economic regulation was not altered by the ICCTA.

House Conference Report No. 104-422, drafted by the House and Senate Committee of Conference to explain their agreement on the form of bill which became the ICCTA, restated Congress' intent to preempt only state *economic* regulation:

> Also integrated into the statement of general jurisdiction is the delineation of the exclusivity of Federal remedies with respect to the regulation of rail transportation. Former section 10103 dealt with remedies in all modes of transportation regulated by the ICC, but since 1980, former section 10501(d) and 11501(b), with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act. *The Conference provision retains this general rule, while clarifying that the exclusivity is limited to remedies with respect to rail regulation — not State and Federal law generally.* For example, criminal statutes governing antitrust matters not preempted by this Act, and laws defining such criminal offenses as

> bribery and extortion, remain fully applicable unless specifically displaced, because they do not generally collide with the scheme of *economic regulation (and deregulation)* of rail transportation.

H.R. Conf. Rep. No. 104-422 at 167 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 852 (emphasis added).

The Ninth Circuit declined to address the distinction in the legislative history between congressional intent to preempt state economic regulations and intent to preempt all state police power regulations, citing "the plain language of two sections of the ICCTA." Appendix A at 13a.

One section, quoted by the court, grants the STB exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state." 49 U.S.C. § 10501(b)(2) (1997). As the court pointed out, this section states that, "The remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under federal or state law." 49 U.S.C. § 10501(b) (1997). The court also pointed to the immunity granted rail carriers for mergers or transactions approved under 49 U.S.C. §§ 11323-25:

> [a] rail carrier . . . participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier . . . carry out the transaction, hold, maintain, and operate property, and exercise

> control or franchises acquired through the transaction.

49 U.S.C. § 11321(a) (1997).

Read in context, these provisions cited by the Ninth Circuit do not unambiguously support its interpretation. The jurisdiction granted to the STB over rail transportation is in the context of regulated *transactions* and their economic aspects — as the words themselves suggest — and do not purport to create a regulatory void for the issues addressed by state and local permits and environmental review.

The noncompelling nature of the Ninth Circuit's conclusion that the statutory language is unambiguous in requiring across-the-board preemption is illustrated by the "plain language" in § 10501, cited by the Ninth Circuit, to the effect that *all* state *and federal* laws are preempted other than the ICCTA. No distinction is made in this language between state and federal laws: no special "saving" exception is included in the language for federal law.

Under the Ninth Circuit's interpretation, devoid of context or reference to legislative history, state and federal law both stand *equally* preempted. However, this can *only* be the case if, as the legislative history explains and the context of the statute suggests, the preempted statutes relate to economic regulation. Otherwise, if the Ninth Circuit's "plain language" reading were adopted, matters concerning railroads would *not* be subject to the federal Clean Water Act (33 U.S.C. § 1251), federal Endangered Species Act (16 U.S.C. § 1531), National Environmental Policy Act (42 U.S.C. § 4321) or the federal Clean Air Act (42 U.S.C. § 7401). Yet, the STB's own rules acknowledge the continued applicability

of various federal laws relating to environment, energy, and historic preservation which, if the "plain language" of the ICCTA were to be credited in the manner which the Ninth Circuit suggests, would not apply:

> These rules are designed to assure adequate consideration of environmental and energy factors in the commission's decision-making process pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332; the Energy Policy and Conservation Act, 42 U.S.C. § 6362(b); and related laws, including the National Historic Preservation Act, 16 U.S.C. § 470f, the Coastal Zone Management Act, 16 U.S.C. § 1451, and the Endangered Species Act, 16 U.S.C. § 1531.

49 C.F.R. § 1105.1.

REASONS FOR GRANTING THE WRIT

The STB rulings and the Ninth Circuit decision, purportedly "definitive" on the effect of the ICCTA, will foster controversies in every state. Acceptance of the Petition now and a definitive construction of the ICCTA by this Court will provide needed guidance as to application of a statute which touches virtually every jurisdiction in the country.

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT ERRED IN REFUSING TO CONSIDER LEGISLATIVE HISTORY.

Context and legislative history are important here. The declaration of "rail transportation policy" at the start of the ICCTA addresses such matters as "competition," "rates," "regulatory barriers," "honest and efficient management of railroads," "fair wages," and "predatory pricing." 49 U.S.C. § 10101 (Appendix F at pp. 81a-82a). Even in the provisions focused upon by the Ninth Circuit, the Act concerns transactions, such as mergers or acquisitions, which are what bring matters before the STB for review. Yet, as a result of the Ninth Circuit decision, railroad action (such as the decision to establish a large terminal in a downtown area) would be exempt from all state and local permitting and environmental review, but not subject to STB scrutiny, in the absence of a merger or other regulated transaction. There is nothing in the legislative history to indicate that this was the intended result of the ICCTA's elimination of state economic regulation of railroads, and much to suggest otherwise. The court should have looked to that history.

Ironically, in a decision by a different panel of the Ninth Circuit issued a few months later, on January 28, 1999, the court cited its *Auburn* decision for the principle that it *could* look to legislative history "where the legislative history clearly indicates that Congress meant something other than what it said." *In Re Catapult Entertainment, Inc.*, 165 F.3d 747, 753 (9th Cir. 1999). *See International Association v. Locke*, 159 F.3d 1220, 1223 (9th Cir. 1998) (dissent by Judge Graber from denial of petition for rehearing and rejection of suggestion for rehearing *en banc)*.

The Ninth Circuit decision here cited this Court's decisions in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996), and in *Rubin v. United States*, 449 U.S. 424, 430 (1981), in support of its interpretation of the ICCTA without reference to its legislative history. Appendix A at p. 17a and n.7. However, *Medtronic* suggests that an examination of the "statutory framework surrounding" an asserted preemption cannot occur without looking at the "structure and purpose of the statute as a whole," which is "revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme" to work. *Medtronic*, 518 U.S. at 486. In fact, *Medtronic* engaged in an extensive analysis of the legislative history as part of its determination of the preemption question presented there. 518 U.S. at 490-92.

Similarly, as this Court pointed out with reference to *Rubin v. United States*, 449 U.S. 424 (1981):

> ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. [citations omitted] This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." [citations omitted] The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.

Watt v. Alaska, 451 U.S. 259, 266 (1981). In short, this Court has held that there can be no rule of law which prohibits reference to aids to construction (including, certainly,

legislative history) "however clear the words may appear on 'superficial examination.' " [citations omitted] *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 455 (1989).[1]

Rather than looking to legislative history to assist in interpreting the ICCTA, the Ninth Circuit looked to various lower-court cases as authority. For example, it referred to a Montana District Court case, *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1294-95 (D. Mt. 1997). Ironically, *Anderson* explicitly relied on the legislative history of the ICCTA (which the Ninth Circuit declined to consider here) to find state regulation of railroad closure of stations preempted. This preemption of a classic instance of regulation of an economic business decision — whether to keep a particular facility open or not — provides no insight into the issue raised by *Auburn*.

Similarly, such cases as *CSX Transportation v. Georgia Public Service Comm'n*, 944 F. Supp. 1573 (N.D. Ga. 1996), cited by the Ninth Circuit do not address the preemption issue presented here. The issue in *CSX* was, again, whether a state could regulate the business decision to close a particular railroad facility, and did not address sweeping preemption of traditional state police powers.

None of the other cases relied upon by the Ninth Circuit provide any greater insight into the critical issue raised by the assertion of sweeping preemption of traditional state police powers. *See, e.g., Georgia Public Service Comm'n v.*

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1. *United States v. Gonzales*, 117 S. Ct. 1032, 1035 (1997), also cited by the Ninth Circuit as authority for not looking at the legislative history, is clearly not on point. In *Gonzales*, this Court observed that the "snippet of legislative history" involved "only muddies the waters." *Id.*

CSX Transportation, Inc., 484 S.E.2d 799, 801-02 (Ga. Ct. App. 1997) (refers to elimination of "anti-competitive micro-management" by ICCTA, with reference to state's attempt to regulate reduction in employees at customer service facility); *In Re Burlington Northern Railroad v. Page Grain Co.*, 545 N.W.2d 749, 751 (Neb. 1996) (state regulation of station closure preempted).

The Ninth Circuit also cited cases from this Court addressing distinct issues under the predecessor to the ICCTA. These cases are not particularly supportive of the result reached by the Ninth Circuit here in interpreting the ICCTA itself. For example, the Ninth Circuit referred to *Norfolk & West Railroad v. American Train Dispatchers Ass'n*, 499 U.S. 117, 127-34 (1991), interpreting a predecessor to the ICCTA, as supporting "a broad reading" of the current statute. Appendix A at p. 15a. However, that broad reading was in the context of the narrow question articulated by this Court, that is, whether the ICCTA's predecessor preempted collective bargaining agreements when those agreements impeded an approved consolidation. 499 U.S. at 134. The *Norfolk* Court was careful to point out that, "The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction." *Id.* It is a substantial leap from determining that a preexisting labor agreement would interfere with a railroad consolidation to sweeping aside all state and local environmental and permitting laws.

II.

THE PETITION SHOULD BE GRANTED BECAUSE IT PRESENTS A SIGNIFICANT QUESTION OF FEDERAL LAW — AND, PARTICULARLY, OF FEDERALISM — WHICH AFFECTS ALL STATES AND THEIR POLITICAL SUBDIVISIONS.

The concern which may have prompted the Ninth Circuit to overlook ambiguities in the statute, and to turn a blind eye to legislative history and clear expressions of legislative intent, was identified by the court itself in its opinion. At the close of its analysis of the preemption issue, it acknowledged Auburn's argument that the environmental review and permitting requirements at issue were environmental rather than economic, and within the traditional state police powers that Congress did not intend to preempt. Appendix A at p. 16a. The court rejected, however, recognition of any such distinction under the ICCTA:

> Additionally, given the broad language of section 10501(b)(2) (granting the STB exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines), the distinction between "economic" and "environmental" regulation begins to blur. For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

Appendix A at p. 16a. This is tantamount to a confession by the court that the burdens of federalism are too great. States and their local constituent jurisdictions are to be left to railroad feudalism, even in matters traditionally subject to state police powers.

Neither the City of Auburn nor its *amicus* supporters below[2] have contested Congress' capacity under the Constitution or intent in the ICCTA to preempt state economic regulation of railroad activities, even where such regulation was permitted in the past. Earlier versions of the Act, which over the last century variously allowed states to regulate station closures, local rates, or other similar matters, have admittedly gone by the board over the years, and particularly with enactment of the ICCTA. However, the proposition now upheld in a particularly extreme form by the Ninth Circuit, that the ICCTA would also prevent a state or city from requiring a permit and environmental review before a river or stream could be blocked or diverted,[3] or before a major

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2. As the Ninth Circuit noted, *amicus* briefs in support of Auburn's position were filed in the Ninth Circuit by the State of Washington and the National League of Cities. Appendix A at p. 8a.

3. The State of Washington particularly noted below, *prior* to the Ninth Circuit's decision, that Burlington's diversion of streams providing fish habitat required permits under state law. *After* the Ninth Circuit decision, in supporting Auburn's request for rehearing, the State reported that Burlington had allegedly poured cement directly into the Wenatchee River, destroying riparian habitat and, in the opinion of the State Department of Fish & Wildlife biologist, causing fish kills. Burlington had not obtained a state permit for the work, and when challenged by the State, cited the recently issued Ninth Circuit decision as preempting the State's hydraulic code. Appendix H.

truck terminal could be established opening onto downtown city streets, represents a serious flight from federalism.

Of course, when a state or one of its political subdivisions requires a permit and a life/safety code inspection for major new construction, when it requires permitting and environmental review before a salmon stream is dammed or diverted (affecting downstream users as well as wildlife), or when it asserts the right to regulate establishment of a new truck terminal facility to ensure safety on its downtown streets, the railroad's bottom line may be affected.[4] However, an incidental effect on the bottom line from a law of general application cannot be deemed as equivalent to impermissible economic regulation of railroads under the ICCTA, particularly where the legislative history reflects no such intent.

The effect of the Ninth Circuit ruling is to establish railroads as sovereigns, answerable to no one. The STB has no interest, expertise, or jurisdiction to regulate matters relating to local environment, land use, or building codes. Unless a matter comes before it because a regulated transaction such as a merger is involved, there will not even

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4. This incidental effect is analogous to that identified by this Court in *City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997), where the Court observed:

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

be a basis for STB jurisdiction over building and land use activities which affect states and localities and which have been traditionally subject to state police powers. Here, for example, Burlington's creation of a new intermodal terminal in its downtown yard will not be subject to any STB review since no triggering transaction occurs. According to the railroad it will not be subject to any other review under the Ninth Circuit's ruling. Regardless of the effects on local citizenry, the railroad asserts it is free to take unfettered action. Review by this Court of the regulatory void which the STB has created and the Ninth Circuit has affirmed is urgently required.

CONCLUSION

The City of Auburn respectfully requests that the Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED SEPTEMBER 3, 1998 AND AMENDED OCTOBER 20, 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY OF AUBURN, a municipal corporation of the state of Washington,

Petitioner,

v.

THE UNITED STATES GOVERNMENT and THE SURFACE TRANSPORTATION BOARD, an agency of the United States Government; KING COUNTY, a Washington municipal corporation; BURLINGTON NORTHERN SANTA FE CORPORATION, a Delaware corporation; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation, et al.,

Respondents.

No. 96-71051

STB No. 33095

ORDER AND AMENDED OPINION

CITY OF AUBURN, a municipal corporation of the state of Washington; CITY OF YAKIMA, a municipal corporation of the state of Washington; CITY OF KENT, a municipal corporation of the state of Washington,

Petitioners,

v.

No. 97-70022

STB No. 32974

Appendix A

U.S. GOVERNMENT; THE SURFACE TRANSPORTATION BOARD, an agency of the United States Government,
Respondents,

BURLINGTON NORTHERN SANTA FE CORPORATION, Burlington Northern Santa Fe Acquisition, Inc. ("BNSF Acquisition") and the Burlington Northern and Santa Fe Railway Company ("BN/Santa Fe"),
Respondents-Intervenors.

CITY OF AUBURN, a municipal corporation of the state of Washington,
Petitioner,

v.

U.S. GOVERNMENT; THE SURFACE TRANSPORTATION BOARD, an agency of the United States Government,
Respondents,

and

BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY,
Intervenors/Respondents.

No. 97-70920
STB No. 33200

Petitions to Review Decisions of
The Surface Transportation Board

Argued and Submitted
June 3, 1998—Seattle, Washington

Appendix A

Filed September 3, 1998
Amended October 20, 1998

Before: Donald P. Lay,* Alfred T. Goodwin and Harry Pregerson, Circuit Judges.

Opinion by Judge Lay

SUMMARY

Environmental Law/Litigation and Procedure

The court of appeals affirmed decisions of the Surface Transportation Board (STB). The court held that the Interstate Commerce Commission Termination Act (ICCTA) preempts state and local permit laws regarding railroad operations.

In 1986, respondent Burlington Northern Railroad Company sold a portion of its Stampede Pass line to the Washington Central Railroad. Burlington continued to operate the remainder of the Stampede Pass line. In 1996, Burlington sought approval by the STB to reacquire the segment of the Stampede Pass line that it had sold to Washington Central. Initially submitting permit applications for proposed improvements and repairs to local authorities, Burlington later adopted the position that the ICCTA preempted state and local law governing environmental review.

King County, Washington sought the STB's opinion on the preemption issue. Petitioner City of Auburn requested that it be designated a party of record in the declaratory proceeding. In a formal declaratory order, the STB concluded that federal law preempted the County's environmental review, and

*Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

denied the City's request to intervene. The City followed the STB's advice to seek a separate declaratory order.

Meanwhile the STB prepared an environmental assessment (EA) of Burlington's proposal as required by the National Environmental Policy Act (NEPA). Following a post-EA to address concerns raised during the public comment period, the STB concluded that Burlington's proposal would not have a significant environmental impact if certain mitigation measures were implemented. The STB approved Burlington's proposal. The City petitioned for review.

[1] Congress and the courts have long recognized a need to regulate railroad operations at the federal level. The Supreme Court has repeatedly recognized the preclusive effect of federal legislation in this area. The Interstate Commerce Act still governs federal regulation of railroads, and has been recognized as among the most pervasive and comprehensive of federal regulatory schemes.

[2] Two sections of the ICCTA explicitly grant the STB exclusive authority over railway projects like Stampede Pass. Section 10501, which governs the STB's jurisdiction, states that the board has exclusive jurisdiction over tracks or facilities, even if they are located entirely in one state. The same section states that the remedies provided with respect to regulation of rail transportation are exclusive and preempt remedies provided under federal or state law. **[3]** Additionally, the statute provides that in a merger or acquisition transaction, a participating rail carrier is exempt from state and municipal law, as necessary to let the carrier hold, maintain, and operate property acquired through the transaction.

[4] There was nothing in the caselaw that supported Auburn's argument that in the ICCTA Congress intended preemption of only economic regulation of the railroads. **[5]** Pre-ICCTA caselaw addressing federal preemption over railroad operations also supported a broad reading of the statute. **[6]**

Those decisions were consistent with decisions addressing similar questions under federal law with similarly broad preemptive scope.

[7] The pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute. [8] Additionally, given the broad language of § 10501(b)(2) (giving the STB exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines), the distinction between "economic" and "environmental" regulation begins to blur. If local authorities impose "environmental" permitting regulations on a railroad, such power would in fact amount to "economic" regulation if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

[9] The congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the language of the ICCTA and the statutory framework. Because congressional intent was clear, and preemption of rail activity is a valid exercise of congressional power under the Commerce Clause, the STB's finding of federal preemption had to be affirmed.

[10] NEPA requires federal agencies to prepare a detailed EIS for major federal actions significantly affecting the quality of the human environment. However, the responsible agency will first prepare an EA to provide sufficient evidence and analysis for determining whether to prepare an EIS, or a finding of no significant impact. Under ICC regulations, the only environmental review necessary in the usual merger proceeding is an EA discussing the impact of additional train traffic due to the merger.

[11] The EA produced by the STB addressed environmental concerns. In addition, the post-EA laid out a long list of mitigation measures. These documents demonstrated that the STB conducted a thorough, independent investigation of the

environmental consequences of the Stampede Pass line reopening as mandated by law. Even if the results were disputed, the EA appeared to be the "hard look" at the factual issues an agency is required to conduct.

[12] The affected cities were given ample opportunity to raise environmental concerns. The STB observed the appropriate procedural requirements, allowed for public comment, and properly informed the public of the environmental issues. This was all that was required. **[13]** Regarding mitigation, an agency may condition its decision not to prepare a full EIS on adoption of mitigation measures. The STB developed specific mitigation conditions to address the City's main concern of traffic delays at crossings, and denied its request to require grade-separated crossings. There was no showing that the denial rendered the mitigation measures inadequate.

[14] There was no merit in the claim that the STB failed properly to consider alternatives to Burlington's proposal. The EA and post-EA recognized that NEPA requires an agency to consider alternatives that are feasible and reasonable. The STB permissibly concluded that the alternatives such as using trucks instead of rail lines were really no alternative because the two railroads would forgo the expected improved service capabilities and increased operating efficiencies that the proposal was meant to achieve.

[15] The parameters of the EA, which excluded the impact of upgrading and rehabilitating the portion of the line already owned by Burlington, did not constitute an abuse of discretion. The only action required by the board was the proposed sale of the segment of the Stampede Pass line to Burlington. It was therefore reasonable for the STB to limit its environmental review to effects that would flow directly from approval of the sale.

Appendix A

COUNSEL

Peter J. Eglick, Helsell Fetterman, Seattle, Washington; Rodney L. Brown, Jr., Marten & Brown, Seattle, Washington; Raymond L. Paolella, Yakima City Attorney's Office, Yakima, Washington, for the petitioners.

Evelyn G. Kitay, Surface Transportation Board, Department of Transportation, Washington, D.C.; Kathryn A. Kusske and Erika Z. Jones, Mayer, Brown & Platt, Washington, D.C.; Paul J. Lawrence and Marc C. Levy, Preston, Gates & Ellis, Seattle, Washington, for the respondents.

Christine O. Gregoire, Matthew A. Love, Neil L. Wise, Office of the Attorney General, Olympia, Washington, for the State of Washington as amicus curiae.

Jeffrey R. Moreland, Richard E. Weicher, Michael E. Roper, Sarah J. Whitley, Burlington Northern Santa Fe Corporation, Ft. Worth, Texas; and Erika Z. Jones, Roy T. Englert, Jr., Kathryn A. Kusske, Peter C. Choharis, Mayer, Brown & Platt, Washington, D.C., for Burlington Northern Santa Fe Corporation, BNSF Acquisition Corporation, and The Burlington Northern and Santa Fe Railway Company, as intervenors.

ORDER

The opinion filed on September 3, 1998 is hereby amended on slip opinion page 10301, footnote 1. Footnote 1 of the opinion should be deleted and the following footnote 1 inserted in its place:

> [1]The cities of Yakima, Washington, and Kent, Washington, were originally parties to the appeal in case No. 97-70022. The cities reached settlement agreements with Burlington on July 20, 1998, and August

5, 1998. The City of Kent's appeal has been dismissed with prejudice. The City of Yakima's appeal is pending final consummation of the settlement agreement.

OPINION

LAY, Circuit Judge:

These appeals arise out of three separate but related decisions of the Surface Transportation Board ("STB"), concerning the reopening of the Stampede Pass railroad line in western Washington state. The City of Auburn[1] challenges the STB's finding of federal preemption of state and local environmental review laws in approval of the reopening of the Stampede Pass line, and objects to the lack of a full Environmental Impact Statement ("EIS"). The Burlington Northern and Santa Fe Railway ("Burlington") has intervened and filed briefs in all three cases.[2]

I. *Factual and Procedural Background*

The Stampede Pass route is a 229-mile rail line running east-west through the Cascade Mountains of Washington state. The City of Auburn (population 37,000) lies at the line's western terminus, at the junction with the north-south Pacific Coast rail line which connects the ports of Seattle and Tacoma.

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[1]The cities of Yakima, Washington, and Kent, Washington, were originally parties to the appeal in case No. 97-70022. The cities reached settlement agreements with Burlington on July 20, 1998, and August 5, 1998. The City of Kent's appeal has been dismissed with prejudice. The City of Yakima's appeal is pending final consummation of the settlement agreement.

[2]Amicus briefs have been filed in case No. 97-70920, by the State of Washington, the National League of Cities, and the Association of American Railroads.

Appendix A

In the early 1980s, Stampede Pass was one of three main lines serving the Seattle-Tacoma area that were owned and operated by Burlington. In 1986, Burlington sold a 151-mile portion of the Stampede Pass line — between the towns of Cle Elum and Pasco — to the Washington Central Railroad ("Washington Central"). Burlington continued to operate the seventy-eight-mile western segment of the line between Auburn and Cle Elum, providing limited local service.

In 1996, Burlington sought approval from the STB to reacquire the eastern segment of Stampede Pass from Washington Central and re-establish the route as a third main rail line in the Pacific Northwest. As part of this plan, Burlington proposed repairs and improvements on the line, which included replacement of track sidings and snow sheds, tunnel improvements, and communication towers. Burlington initially submitted certain permit applications for these projects to local authorities. However, during the permit-review process, Burlington contended that local environmental review was precluded by federal regulation.

In response to Burlington's position, King County, Washington, in May 1996 requested an informal opinion from the STB, asking whether the Interstate Commerce Commission Termination Act, codified at 49 U.S.C. § 701 et seq., ("ICCTA")[3] preempted the county's ability to review the environmental impact of proposed operations on the Stampede Pass line. In June 1996, the STB issued an informal opinion that the line was not subject to state and local permit requirements.

In August 1996, King County requested a formal declaratory order from the board as to whether the ICCTA preempted

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[3]The ICCTA abolished the Interstate Commerce Commission, created the STB, and granted the board jurisdiction over certain interstate rail functions and proceedings. *See* the ICC Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995).

the county's environmental review. On September 17, 1996, the City of Auburn wrote to the STB and requested designation as a party of record in the declaratory proceeding. On September 25, 1996, the STB issued its decision in the *King County* petition, finding federal preemption. *See King County Petition for Declaratory Order*, STB Finance Docket No. 32974, 1996 WL 545598 (I.C.C. September 25, 1996).[4]

In the *King County* order, the STB denied Auburn's request to intervene, but invited the city to submit its own petition for a declaratory order. *See id.* at *5, n.2. Auburn, joined by the City of Kent, followed this advice by filing a separate declaratory order petition on October 11, 1996. In July 1997, the STB denied the cities' petition, stating the action was "treated as a petition for reconsideration of *King County.*" *Cities of Auburn and Kent Petition for Declaratory Order*, STB Finance Docket No. 33200, 1997 WL 362017, at *8 (I.C.C. July 2, 1997).[5]

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[4]Auburn filed a petition with the Ninth Circuit in November 1996 for review of the board's *King County* decision. In March 1997, this court dismissed the city's appeal in part, finding the city lacked standing to obtain review on the merits because it was not a party to the proceedings below. *See City of Auburn v. United States*, No. 96-71051 (9th Cir. March 26, 1997) (order granting in part motion to dismiss).

[5]Auburn has also filed a separate appeal, No. 96-71051, consolidated with the present appeal, contending it was denied party status in the earlier *King County* petition despite a specific request that the STB not rule on the preemption issue until the city had an opportunity to make a submission. The law is quite clear that an appeal should be dismissed as moot if the occurrence of intervening events renders a decision unnecessary. *See, e.g., American Casualty Co. v. Baker*, 22 F.3d 880, 896 (9th Cir. 1994); *Carter v. Veterans Admin.*, 780 F.2d 1479, 1481 (9th Cir. 1986). We hold this appeal moot. The record makes clear that "interim relief or events have deprived the court of the ability to redress the party's injuries." *United States v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9th Cir. 1987).

It is difficult to understand how the relief Auburn now seeks, the reopening of *King County* so that the city may intervene, is any different from the relief it received — a hearing on its own petition. Both petitions

While parties were disputing the preemption question, Burlington's petition for approval under 49 U.S.C. §§ 11323-25 to reacquire and conduct improvements on the Stampede Pass line was proceeding. Pursuant to the National Environmental Policy Act, codified at 42 U.S.C. § 4321 et seq. ("NEPA"), the STB's environmental staff in September 1996 prepared an Environmental Assessment ("EA") of Burlington's proposal. After the EA was released, comments were solicited and all interested parties were given an opportunity to respond. After comments were received, a post-EA was prepared to address the concerns raised. The EA and post-EA concluded Burlington's proposal would not have a significant environmental impact, if certain mitigation measures were implemented.

The STB approved Burlington's proposal in October 1996. *See Burlington Northern Decision*, STB Finance Docket No. 32974, 1996 WL 614254 (I.C.C. October 25, 1996). That action is now challenged by the City of Auburn.

II. *Federal Preemption*

Auburn asserts that the STB erred in finding federal preemption of state and local environmental permitting laws because the ICCTA legislative history establishes Congress' intent to preempt only *economic* regulation of rail transportation, not the traditional state police power of environmental

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dealt with the identical issue concerning ICCTA preemption of local environmental permitting laws. Because the concerns of the city already have been raised and considered, any order by this court for the STB to do so — again — would be redundant. In effect, the controversy has been addressed, and this court now lacks the power to address it any further. *See Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1254 (9th Cir. 1984) ("Where events have occurred that prevent us from granting effective relief, we lack jurisdiction and must dismiss the appeal.").

It also makes little sense to order the STB to reopen the *King County* petition now, when the question addressed in the petition is being decided by this court in case No. 97-70920. *See* Part II *infra*.

review. The city points to a report from the House Transportation and Infrastructure Committee, which indicates that in passing the ICCTA, Congress meant to "occupy[ ] the entire field of economic regulation of the interstate rail transportation system," but retain for the states "the police powers reserved by the Constitution." H.R. Rep. No. 104-311, 104th Cong., 1st Sess., at 95-96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08. Auburn argues that the local regulations at issue are not economic regulations, but rather "essential local police power required to protect the health and safety of citizens . . . ." Auburn Br., No. 97-70920, at 25.

Additionally, the city argues that the ICCTA contains no provision expressly preempting state and local land use and environmental regulations. It contends that because of the presumption against preemption in fields traditionally occupied by the states, none of the express language in the ICCTA can be read to usurp local environmental review.

[1] We begin by first noting that Congress and the courts long have recognized a need to regulate railroad operations at the federal level. Congress' authority under the Commerce Clause to regulate the railroads is well established, *see, e.g., Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 350-52 (1914); *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989), and the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area. *See, e.g., Colorado v. United States,* 271 U.S. 153, 165-66 (1926) (ICC abandonment authority is plenary and exclusive); *Transit Comm'n v. United States,* 289 U.S. 121, 127-28 (1933) (ICC authority over interstate rail construction is exclusive); *City of Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77, 88-89 (1958) (local authorities have no power to regulate interstate rail passengers). The Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), which, as amended, still governs federal regulation of railroads, has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago*

& N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981).[6]

Second, we note that Auburn places great reliance on the legislative history of the ICCTA. However, while "[l]egislative history can be a legitimate guide to a statutory purpose obscured by ambiguity . . . in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (internal quotations omitted). "The starting point in statutory interpretation is 'the language [of the statute] itself,' " *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)), and where statutory command is straightforward, "there is no reason to resort to legislative history." *United States v. Gonzales*, ___ U.S. ___, 117 S. Ct. 1032, 1035 (1997).

[2] We find that the plain language of two sections of the ICCTA explicitly grant the STB exclusive authority over railway projects like Stampede Pass. Section 10501 of the ICCTA, which governs the STB's jurisdiction, states the board will have *exclusive* jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. § 10501(b)(2) (1997). The same section states that "the remedies provided under this part

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[6]In 1980, Congress took additional steps to reduce regulatory authority of the states over interstate rail lines by passing the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980). Before 1980, the ICC was empowered to preempt state regulation of intrastate lines only when an intrastate rate set by the state unjustly discriminated against or imposed an undue burden on interstate commerce. In the Staggers Act, Congress expressly provided that states could only regulate if they applied federal standards. *See Interstate Commerce Comm'n v. Texas*, 479 U.S. 450, 453-54 (1987).

with respect to regulation of rail transportation are *exclusive* and *preempt* the remedies provided under Federal or State law." 49 U.S.C. § 10501(b) (1997).

[3] Additionally, the statute expressly provides that in a merger or acquisition transaction approved under 49 U.S.C. § 11323-25, "[a] rail carrier . . . participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, *including state and municipal law*, as necessary to let that rail carrier . . . hold, maintain, and operate property . . . acquired through the transaction." 49 U.S.C. § 11321(a) (1997) (emphasis added). The section unambiguously states: "The authority of the Board under this subchapter is *exclusive." Id.* (emphasis added).

The preemptive effect of the ICCTA, which went into effect January 1, 1996, is a question of first impression on the appellate level of this circuit. The district courts which have had the opportunity to examine this question have applied federal preemption. Despite the petitioner's claims to the contrary, the reasoning of these courts support preemption in this case as well.

In *CSX Transp., Inc. v. Georgia Public Service Comm'n*, 944 F.Supp. 1573 (N. D. Ga. 1996), the district court found § 10501(b)(2)'s preemption of state regulation of railroad agency closings by stating: "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." 944 F.Supp. at 1581. "Interpreting the preemption clause in the ICC Termination Act to be broad enough to preempt state regulation of agency closings," the court stated, "is consistent with the Act's grant of exclusive jurisdiction over almost all matters of rail regulation to the STB." *Id.*

The Montana district court in *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288, 1294-95 (D. Mt. 1997), made a similar broad reading of the ICCTA to find

preemption of state regulation of railroad agencies. "Legislative history supports this analysis," the court stated, "as Congress noted that the 'Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive.' " 959 F.Supp. at 1295 (quoting H.R. Rep. No. 104-311, 104th Cong., 1st Sess., at 96 (1995), *reprinted in* U.S.C.C.A.N. 793, 808).

[4] In fact, there is nothing in the case law that supports Auburn's argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads. All the cases cited by the parties find a broad reading of Congress' preemption intent, not a narrow one. *See also Georgia Public Service Comm'n v. CSX Transp., Inc.*, 484 S.E.2d 799, 801 (Ga. Ct. App. 1997); *In re Burlington Northern R.R.*, 545 N.W.2d 749, 751 (Neb. 1996).

[5] Pre-ICCTA case law addressing federal preemption over railroad operations also supports a broad reading of the statute. In *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 127-34 (1991), the Supreme Court found broad preemption in § 11341(a), which, as amended by the ICCTA, is now § 11321(a). The Court stated: "The contested language in § 11341(a), exempting carriers from 'the antitrust laws and all other law, including State and municipal law,' is clear, broad, and unqualified." 499 U.S. at 128. "By itself," the court concluded, "the phrase 'all other law' indicates no limitation." *Id.* at 129.

[6] These court decisions interpreting the preemptive scope of the ICCTA also are consistent with decisions of courts addressing similar questions under federal laws with similarly broad preemptive scope. *See, e.g., California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 506-07 (1990) (preempting state water flow requirements designed to protect trout); *Sayles Hydro Associates v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993) (preempting state permitting of a hydro-

electric project); *Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles*, 979 F.2d 1338, 1340-41 (9th Cir. 1992) (finding federal preemption of local airport construction ordinances).

[7] Auburn attempts to distinguish its permitting requirements as environmental rather than economic regulation, claiming this is a "traditional state police power" that Congress did not intend to preempt. It correctly points out that courts have declined to preempt state environmental regulation in some other contexts. *See, e.g., Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 501 (9th Cir. 1984). However, the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute. *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 738 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) (Preemption of state law is compelled if Congress' command is explicitly stated in the federal statute's language or implicitly contained in its structure or purpose.)

For example, in *Hammond*, the court allowed an Alaska statute governing the discharge of ballast by oil tankers after finding that in the Clean Water Act, Congress "clearly expressed its intent to allow the states to take an active role in abating water pollution." 726 F.2d at 489. In contrast, there is no evidence that Congress intended any such state role under the ICCTA to regulate the railroads.

[8] Additionally, given the broad language of § 10501(b)(2), (granting the STB exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines) the distinction between "economic" and "environmental" regulation begins to blur. For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

[9] We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).[7] Because congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause, we affirm the STB's finding of federal preemption.

III. *Environmental Assessment of the Stampede Pass Reopening*

[10] The NEPA requires federal agencies to prepare a detailed EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1994). However, under federal regulations promulgated by the Council on Environmental Quality, the responsible agency will first prepare an Environmental Assessment to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1) (1997). Under ICC regulations, the only environmental review necessary in the usual merger proceeding is the preparation of an EA, discussing the impact of additional train traffic due to the merger. *See* 49 C.F.R. § 1105.6(b)(4) (1997).

Auburn contends the STB abused its discretion by failing to take the necessary "hard look" at the possible environmental consequences of Burlington's proposal. It claims the board ignored evidence regarding the traffic and noise impact of the reopening on the city. The city also maintains the STB vio-

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[7]Because we find the Congress explicitly preempted state and local regulation of the Stampede Pass reopening, it is unnecessary to apply either a conflict preemption or field preemption analysis to the issue. *See Rubin v. United States*, 449 U.S. 424, 430 (1981) (When a court finds the terms of a statute unambiguous, judicial inquiry is complete.)

lated the NEPA by failing to present and analyze alternatives to the proposal, and claims the mitigation supporting the board's finding of no significant impact is "vague, conclusory, and ineffective." Auburn Br., No. 97-70022, at 47.[8]

We begin by noting that an appellate court gives great deference to an agency determination regarding NEPA requirements. *See Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331 (9th Cir. 1992). The petitioner must make a showing that the STB's determination not to conduct a full EIS was arbitrary, capricious, or an abuse of discretion. *See id.* While the petitioner argues that the board did not take the requisite "hard look" at the environmental issues in this case, we believe that the record belies this assertion.

[11] The EA produced by the STB is more than sixty pages long. It addresses environmental concerns such as rail traffic increases, transportation safety, energy, air quality, and noise. In addition, the post-EA produced by the board lays out a long list of mitigation measures.[9] These documents demonstrate

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[8]Auburn also argues that an attached affidavit of Auburn's city traffic engineer, not available at the time of the STB decision, now should be considered by this court to provide "clarification of technical issues." Auburn Br., No. 97-70022, at 61-62. However, this court repeatedly has stated that judicial review in NEPA cases almost always should be based upon the record presented to the agency. *See, e.g., Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir. 1998); *National Audubon Society v. United States Forest Serv.*, 46 F.3d 1437, 1447 (9th Cir. 1993); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988), *modified*, 867 F.2d 1244 (9th Cir. 1989). This rule is in keeping with the court's limited review of determining only whether the agency's decision was made in arbitrary and capricious manner. Auburn fails to demonstrate why an exception to the general rule should be made in this case.

[9]Mitigation measures recommended by the post-EA and adopted by the STB require the railroad to: 1) give notice to the towns of train schedules; 2) provide copies of all applicable Emergency Response Plans; 3) provide

that the STB conducted a thorough, independent investigation of the environmental consequences of the Stampede Pass line reopening as mandated by law. Auburn disputes the STB's assessment of potential environmental impact, but that alone does not render the board's findings arbitrary and capricious. Even if one may dispute the results, the EA appears to be the "hard look" at the factual issues an agency is required to conduct.

As a reviewing court, "[w]e are not free to substitute our judgment for that of the agency as to the environmental consequences of its actions. . . . Instead, our task 'is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.' " *Association of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1183 (9th Cir. 1997) (quoting *Baltimore Gas & Elec. Co. v. Natural Resources Defense, Inc.*, 462 U.S. 87, 97-98 (1983)).

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an 800 number to all local emergency response forces; 4) transport all hazardous materials in compliance with U.S. Department of Transportation regulations; 5) consult with state and local officials to develop a priority list and discuss "funding options" for crossing signal upgrades; 6) space train movements to allow for grade crossings to clear; 7) operate trains to reduce locomotive fuel consumption and air pollution; 8) within 30 days of the effective date of the board's decision, consult with the Washington Department of Fish and Wildlife to facilitate: a) maximum protection of the Yakima and Green rivers, b) vegetation control along the right of way as a means of fire suppression management, c) wildlife movement and access to water, d) minimal adverse impacts on wildlife and protection of water quality, and e) provision, placement and maintenance of fire suppression vehicles in the Yakima Canyon area; 9) prevent, contain, and control any fire that may occur; 10) apply only herbicides registered with the U.S. Environmental Protection Agency; 11) install and maintain, if requested, protective fencing in recreation areas; 12) provide an 800 number to facilitate communication between local communities and the railroad, and 13) consult with state and local authorities to identify grade crossings where temporary signs should be posted to alert motorists of increased rail traffic. *See* ER Vol. V, Tab HH, pp. 22-26.

[12] We also find that the affected cities were given ample opportunity to raise their environmental concerns before the board for the requisite consideration. After the initial EA was released, comments were solicited and all interested parties were given an opportunity to respond. Following comments from the parties, the STB issued its post-EA addressing the parties' concerns. "Because NEPA is essentially a procedural statute, an agency's actions under NEPA are generally reviewed to determine if the agency observed the appropriate procedural requirements." *Northcoast Envtl. Ctr.*, 136 F.3d at 665. The STB in this case "observed the appropriate procedural requirements," allowed for public comment, and properly informed the public of the environmental issues. This was all that was required of the STB under the NEPA's statutory guidelines.

[13] Regarding mitigation, it is clear that an agency may condition its decision not to prepare a full EIS on adoption of mitigation measures. *See, e.g., Jones v. Gordon*, 792 F.2d 821, 829 (9th Cir. 1986); *The Steamboaters v. Federal Energy Regulatory Comm'n*, 759 F.2d 1382, 1394 (9th Cir. 1985). The STB developed three specific mitigation conditions (notice of expected train movements, discussion of funding options for crossing upgrades, and spacing of train movements to allow time for crossings to clear) to address the city's main concern of traffic delays at rail crossings. While the board denied the city's request to require construction of grade-separated crossings, there is no showing that this denial alone renders the mitigation measures inadequate.

[14] Additionally, we find no merit in the petitioner's claim that the STB failed to properly consider alternatives to Burlington's proposal to re-establish Stampede Pass as a major line. The EA and post-EA specifically recognized that the NEPA requires an agency to consider alternatives to the action that are feasible or reasonable. The STB permissibly concluded that "alternatives" such as using trucks instead of rail lines to transport goods are really no alternative at all,

because "the two railroads would forego the expected improved service capabilities and increased operating efficiencies that this proposal is meant to achieve." ER, Vol V, Tab HH at 22.

[15] Finally, we find the parameters of the EA set by the STB, which exclude the impact of the upgrading and rehabilitating of the portion of the rail line already owned by Burlington, do not constitute an abuse of discretion. There is no showing the STB's determination that those impacts fell outside of its jurisdiction under this proceeding constitutes an arbitrary and capricious finding. The only action requiring approval by the board was the proposed sale of the eastern segment of the Stampede Pass line to Burlington. It therefore was entirely reasonable for the STB to limit its environmental review to effects that would flow directly, from the approval of the sale.

IV. *Conclusion*

The STB's denial of the City of Auburn's request to intervene in the 1996 declaratory relief proceeding brought by King County is moot, because the city was granted a separate proceeding and because this court now has ruled on the preemption issue. State and local permitting laws regarding railroad operations are preempted by the plain language of the ICCTA, and the statutory framework surrounding it. Finally, there is no showing that the STB abused its discretion or rendered a ruling that is arbitrary and capricious by approving the Stampede Pass line reopening without conducting a full EIS. For these reasons, we find the rulings of the STB should be AFFIRMED.

APPENDIX B — DECISION OF THE SURFACE TRANSPORTATION BOARD DATED AND DECIDED JULY 1, 1997

SERVICE DATE — JULY 2, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33200

CITIES OF AUBURN AND KENT, WA — PETITION FOR DECLARATORY ORDER — BURLINGTON NORTHERN RAILROAD COMPANY — STAMPEDE PASS LINE

Decided: July 1, 1997

On October 11, 1996, the Cities of Auburn and Kent, WA (the Cities or petitioners) requested a declaratory order to the effect that state and local environmental, building, and land use permitting authority can be imposed on improvements associated with the modernization by the Burlington Northern Railroad Company (BN)[1] of its Stampede Pass railroad line in the state of Washington, and is not preempted by federal law. Specifically, the Cities contend that their local land use and environmental permitting authority is not preempted by the ICC Termination Act of 1995 (ICCTA) or the environmental review process undertaken by this agency pursuant to the National Environmental Policy Act (NEPA). BN replied, opposing the Cities' petition.[2] The Cities then responded to BN's reply, as did BN to the Cities' response.

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1. Now, The Burlington Northern and Santa Fe Railway Company.

2. King County, WA filed a petition to intervene as an interested party. That request will be granted.

Appendix B

BACKGROUND

1. *The Nature of the Case.* Because BN owned and operated two other main line routes serving the Seattle-Tacoma, WA area, BN sold the eastern portion of its Stampede Pass main line — a 151-mile segment between Cle Elum and Pasco, WA — and several branch lines to the Washington Central Railroad Company (WC) in 1986.[3] After the sale, BN continued to provide some local service over the western approximately 78-mile portion of the line between Auburn and Cle Elum. Due to increases in rail traffic after the sale, however, BN proposed to reacquire the Stampede Pass lines from WC and reestablish the Stampede Pass as a third main line route. Accordingly, in June 1996, BN and its affiliates sought our approval under 49 U.S.C. 11323-25 to acquire control of WC and operate WC's 151-mile segment of the Stampede Pass line in concert with its western portion.[4] That proceeding — which is not directly at issue here — was docketed as STB Finance Docket No. 32974.[5] *See* p. 5-6, *infra*.

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3. *See Washington Central Railroad Company, Inc. — Exemption Acquisition and Operation — Certain Lines of Burlington Northern Railroad Company*, Finance Docket No. 30916 (ICC served Oct. 3, 1986).

4. BN and its affiliates also proposed to acquire certain of WC's branch lines and assume WC's obligation to operate over Union Pacific Railroad Company's Yakima Branch line between Kennewick and Yakima, WA.

5. In that proceeding, BN explained that the Stampede Pass line would provide an important link to international markets in the Pacific Rim and that rail freight traffic to be transported on this line would be

(Cont'd)

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After 12 years of limited use, the Stampede Pass line was in need of modernization, repairs, and improvements. This work included (1) replacement of track sidings, (2) replacement of maintenance-of-way buildings and snow sheds, (3) improvement of the Stampede Pass tunnels, and (4) installation of communication towers. BN initially submitted certain permit applications for these projects to local authorities. During the permit review process, however, BN suggested that any environmental review of the project should exclude railroad operations, which are regulated exclusively by the federal government.

In light of BN's position, King County, WA (the County), on May 8, 1996, asked the Surface Transportation Board (Board) for an informal opinion as to whether ICCTA preempts the County's authority to evaluate or condition BN's proposed operations of the Stampede Pass rail line within the County and to issue grading, building or conditional use permits for construction. BN joined in the County's request for an informal opinion on May 31, 1996, requesting expedited action so that,

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important to the future economic growth of the Pacific Northwest. Its proposal to put the Stampede Pass route back in service was supported by the Ports of Seattle and Tacoma, the State Department of Transportation, and communities in the eastern part of the state. None of the commenters to BN's proposal raised any competitive concerns. Indeed, many of the commenters recognized the benefits to be derived from BN's ability to offer a shorter route for certain traffic and, at the same time, reduce congestion on other BN routes for time sensitive traffic. The Cities participated in our proceeding. They did not oppose the project, although they expressed concern about the potential environmental impacts that could result from increased traffic and requested environmental conditions during the course of our environmental review process to mitigate those impacts.

if the railroad obtained a favorable decision, the repairs and improvements to the Stampede Pass line could begin by July 1, 1996.[6] BN recognized that the states retain their police powers with respect to railroad safety. However, it stated that the County's powers over its repairs and upgrades are extremely limited due to broad federal preemption of railroad transportation. Citing ICCTA, judicial, and Interstate Commerce Commission (ICC) precedent, it asserted that allowing localities to regulate rail line maintenance and upgrading through an environmental review and permitting process would paralyze the national rail transportation system.

On June 20, 1996, the Secretary of the Board issued to the County and BN an informal, nonbinding opinion that the County's permitting process was preempted by ICCTA.[7] The Secretary noted that the County, if allowed to subject BN to the permitting process, could delay or deny BN authority to undertake the improvements to the Stampede Pass line and thus could in effect prevent BN from operating the line. As a result, he concluded that the state or local permitting process appeared to interfere with the federal licensing program and unreasonably

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6. BN explained that, if work did not begin by that date, it would seriously jeopardize the railroad's ability to complete the repairs and improvements before the onset of winter ended the work season in the area.

7. While the Secretary limited the scope of his opinion to preemption under ICCTA, he noted (Informal Opinion at 2. n.2) that BN also must comply with the safety and environmental requirements imposed by other federal statutes, such as the Clean Water Act's National Pollution Discharge System program involving water quality issues relating to spills into lakes or streams. Train noise also is subject to federal jurisdiction, and local standards may not be imposed unless identical to federal standards. 42 U.S.C. 4916(c); 49 CFR Part 210.

burden interstate commerce. At the same time, the Secretary recognized that state and local governments were entitled to protect the health and safety of their citizens through means other than the permitting process.[8]

On August 21, 1996, the County petitioned for a formal declaratory order similar to the one currently sought by the Cities. The County argued, as the Cities maintain here, that BN was required to obtain local permits before undertaking improvements to the Stampede Pass rail line. In *King County, WA — Petition for Declaratory Order — Burlington Northern Railroad Company — Stampede Pass Line*, STB Finance Docket No. 33095 (STB served Sept. 25, 1996) (*King County*),[9] we

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8. Based on the Secretary's opinion, BN withdrew its pending grading, building, and shoreline application permits that had been filed with the County.

9. The City of Auburn also filed a lawsuit in King County Superior Court seeking a declaratory judgment that BN's proposed improvements to the Stampede Pass line are subject to state and local permitting and a writ of mandamus directing the County and Kittitas County to order construction stopped until permits are obtained. At BN's request, that case was removed to the United States District Court for the Western District of Washington on September 30, 1996. *City of Auburn v. King County Et Al.*, No. C96-1565-Z. BN then moved to dismiss the district court case for lack of jurisdiction, explaining that the action constituted a collateral attack on *King County*, which could only be challenged in a United States Court of Appeals under the Hobbs Act, 28 U.S.C. 2321(a) and 2342. On January 7, 1997, the district court granted the motion to dismiss.

The City of Auburn, which had not been a party to the administrative proceeding in *King County*, filed a petition for judicial review of *King*

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determined (slip op. at 4) that ICCTA wholly preempts the County's permitting of construction relating to the reopening of the Stampede Pass:

> The County permitting process contemplated for this project would both interfere with the federal licensing program and unreasonably burden interstate commerce. Accordingly, it would be preempted by the ICCTA.

No stay of *King County* was sought from us or from the Ninth Circuit.

The Cities were not parties to the County's petition, and did not initially seek to formally intervene in our *King County* proceeding. On September 17, 1996, however, the City of Auburn sent a letter to the Board as an "interested party." In that letter, the City of Auburn requested that it be designated a party of record in *King County*, and asked that we defer action in *King County* until we had the opportunity to consider the

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County in *City of Auburn v. STB*, U.S.C.A. 9th Cir. No. 96-71051 (pet. for review filed November 22, 1996). BN then filed a motion to dismiss the lawsuit (which we supported), explaining that City of Auburn was not a "party aggrieved" within the meaning of 28 U.S.C. 2344 and therefore lacked standing to file a petition for judicial review. By order dated March 26, 1997, the court granted BN's motion to dismiss in part. The court agreed that because City of Auburn was not a party to the proceedings below, it lacked standing to obtain review on the merits of *King County*. However, noting that it may have jurisdiction to review our denial of City of Auburn's request to intervene in *King County*, the court directed the parties to brief that issue. That court proceeding remains pending in the Ninth Circuit.

City of Auburn's position on this matter. The City of Kent also requested a ruling from us on local government preemption.

In view of the County's and BN's requests for expedition in *King County*, we denied the Cities' requests to intervene in *King County*, and declined to delay the issuance of our declaratory order in that proceeding (which was decided on September 25, 1996, only 8 days after the date of the City of Auburn's letter). *See King County*, at 1 n. 2. However, we invited the Cities to submit their own petition for declaratory order in a separate docket (*id.*), and on October 11, 1996, the Cities accepted our invitation and filed the instant petition requesting a declaratory order similar to the one previously requested by the County. The Cities' petition, in effect, is a petition for reconsideration of our decision in *King County*, and we will treat it as such.[10]

Subsequently, in a decision served October 25, 1996, we approved BN's proposed control of WC and operation of WC's segment of the Stampede Pass rail line. In that proceeding, we conducted an environmental review under NEPA of BN's proposed operation of the entire Stampede Pass line. *See Burlington Northern Santa Fe Corporation, BNSF Acquisition Corp., and Burlington Northern Railroad Company — Control*

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10. In their petition for declaratory order, the Cities alternatively ask the Board to vacate *King County* to permit the matter to be resolved judicially. That request will be denied. It is appropriate for us to issue a declaratory order addressing the jurisdictional questions presented here, subject, of course, to the right of a dissatisfied party to seek judicial review. *See, e.g.*, 5 U.S.C. 554(e); 49 U.S.C. 721(a); *Gray Lines Tour Co. v. ICC*, 824 F.2d 811, 815 (9th Cir. 1987). *Texas v. United States*, 866 F.2d 1546 (5th Cir. 1989) (agencies have jurisdiction to determine the scope of their jurisdiction).

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— *Washington Central Railroad Company*, STB Finance Docket No. 32974 (STB served Oct. 25, 1996), *pending review in City of Auburn v. United States*, U.S.C.A. 9th Cir. 97-70022 (pet. for review filed December 20, 1996) (*BNSF Control*).[11]

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11. As required by our environmental rules for proceedings where (as in this case) the railroad has demonstrated that the particular proposal would involve operational changes that meet the agency's thresholds for environmental review but were not expected to result in a significant environmental impact (*see* 49 CFR 1105.6(b)(4), 1105.6(d)) an Environmental Assessment (EA) was prepared. The EA was based on the information provided by BN or the third-party consultant, consultation with appropriate environmental agencies, and independent investigation and verification by the Board's Section of Environmental Analysis (SEA). The EA also assessed and developed environmental mitigation to address potential environmental impacts based on an increase in traffic to the City of Auburn. (Our environmental documentation did not address the potential effects of upgrading, maintaining, or rehabilitating the line because those actions were within the railroad's management discretion and did not require our approval. *See BNSF Control* at 9.)

The EA was made available for public comment. SEA then issued a detailed Post Environmental Assessment (Post EA) based on its investigation of the comments received. The Post EA recommended final environmental mitigation measures and concluded that, if the mitigation recommended in the Post EA were imposed and implemented, the project would not have significant environmental impacts. The comments to the EA, the EA, and the Post EA were forwarded to us for consideration in making our decision in the case. We then issued our October 1996 decision granting the application with various environmental mitigating conditions to address environmental concerns raised by petitioners and others. We concluded that, as conditioned, the *BNSF Control* proceeding would not have significant environmental impacts. The Cities then filed their environmental court challenged of *BNSF Control*, which remains pending in the Ninth Circuit.

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2. *The Parties' Claims.* In their petition for declaratory order, the Cities concede that local law is preempted by Federal law if: (1) Congress expressly preempts such activity; (2) Federal law so thoroughly occupies a legislative area that it is reasonable to conclude that Congress intended to prohibit local regulation of the activity; (3) Federal law or regulation actually conflicts with state or local law; or (4) State or local law discriminate against or unreasonably burden interstate commerce. Petitioners maintain, however, that none of these criteria apply to BN's proposed improvements to the Stampede Pass line. According to the Cities, there is nothing in ICCTA that directly preempts state or local law with respect to railroad transactions such as this one. Any incidental effect of local law on interstate commerce, the Cities argue, is legitimately within their police power and justified by the benefits accruing to the local populace and environment.

Petitioners complain that our decisions in *King County* and *BNSF Control* have allowed BN's Stampede Pass improvements to be virtually unregulated. The mitigation measures imposed on the carrier in *BNSF Control*, the Cities maintain, lack substance and do not adequately address their environmental or safety concerns. The Cities assert that the Board's decision in *King County* is not binding on local agencies or the courts because the decision is merely advisory and the Board lacks expertise in state and local environmental matters.

BN by contrast argues that all state and local permitting regulations for BN's improvements to the Stampede Pass are preempted by federal law.

Appendix B

DISCUSSION AND CONCLUSIONS

We will exercise our discretionary authority to issue a declaratory order in this proceeding to eliminate controversy and remove uncertainty on the preemption issue raised by petitioners.[12] 5 U.S.C. 554(e) and 49 U.S.C. 721. We will not attempt here to analyze any particular ordinances or local regulatory requirements; the review of individual ordinances or state or local regulations is beyond the scope of our limited inquiry in this case and is more appropriately an issue for the courts. However, we will set out in this decision our view of our role, and the appropriate role of state and local regulation, in regulating BN's reactivation of the Stampede Pass line.

At the outset, we reaffirm her our determination in *King County* (at pp. 3-5) that a state or local permitting process for prior approval of this project, or of any aspect of it related to interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted. The power to authorize the construction of railroad lines and the power to authorize railroads to operate over them has been vested exclusively in the Board by 49 U.S.C. 10901. The ICCTA abolished the ICC, established the Board as the successor to the ICC, and revised the law as it existed in the former Interstate Commerce Act, all effective January 1, 1996. The Board now has exclusive authority over the construction and operation of rail lines that are part of the interstate rail network, pursuant to 49 U.S.C. 10501(b) and

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12. It should be noted, however, that at this point there may be little need for our guidance. As discussed above, no stay of *King County* was sought from us or from the Ninth Circuit, and it is our understanding that the improvements to the Stampede Pass line largely have been completed.

10901. The ICC and court precedents regarding the ICC's preemptive authority now apply to the Board's authority. *See* ICCTA section 205.

In the Transportation Act of 1920, Congress established a comprehensive scheme of federal regulation of track additions and deletions by interstate railroads like BN.[13] *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (*Kalo Brick*) (ICC abandonment authority is plenary and exclusive); *Transit Comm'n v. United States*, 289 U.S. 121 (1933) (same for constructions). Moreover, under the Commerce and Supremacy Clauses of the United States Constitution, "there can be no divided authority over interstate commerce * * * [T]he acts of Congress on that subject are supreme and exclusive." *Missouri Pac.* R.R. *v. Stroud*, 267 U.S. 404, 408 (1925). *See also Edgar v. Mite Corp.*, 457 U.S. 624, 640 (1982), *Kalo* Brick, 450 U.S. at 318. Indeed, Congress in ICCTA confirmed that the Board's jurisdiction over transportation by rail carriers like BN is exclusive and preempts the remedies under Federal or state law. 49 U.S.C. 10501(b)(2). *See also* 49 U.S.C. 11321(a) (a transaction approved under 49 U.S.C. 11323-25 is exempt from state or local law "as necessary to let that rail carrier . . . carry out the transaction . . . and operate properly."). Thus, any state or local statute that requires an interstate railroad like BN to obtain state or local approval before construction or abandonment of a line, or a merger or acquisition of control, would appear, on its face, to conflict with ICCTA and is preempted.

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13. The BN line through Stampede Pass was built before Congress gave the ICC the authority to approve the construction of rail lines, but authority to approve the construction of the line was "grandfathered" under the provisions of the 1920 Act.

Appendix B

In *King County*, we indicated that, in transactions such as *BNSF Control* requiring Federal approval and federal environmental review, there is no role for state and local agencies to play other than to participate in the Federal environmental review process under NEPA for the proposed action. Because there are significant roles for state and local agencies under various federal statutes, including environmental statutes, we want to clarify that statement here. For example, the Clean Air Act requires states to implement plans to protect and enhance air quality so as to promote the public health and welfare. *See* 42 U.S.C. 7401 *et seq.* Rather than relegating state and local agencies to the periphery in implementing Federal law, the statutory scheme gives individual states the responsibility of developing and enforcing air quality programs that meet or exceed the national standards within their borders.[14] *See Chevron v. U.S.A. Inc., Hammond*, 726 F.2d 483, 489 (9th Cir. 1984) (Hammond), *cert. denied*, 471 U.S. 1140 (1985). Nothing in *King County* or this decision is intended to interfere with the role of the states and local entities in implementing these federal laws.

Moreover, as explained in *King County* and the Secretary's informal opinion, not all state and local regulations that affect interstate commerce are preempted. A key element in the preemption doctrine is the notion that only "unreasonable" burdens, *i.e.*, those that "conflict with" Federal regulation, "interfere with" Federal authority, or "unreasonably burden" interstate commerce, are superseded. The courts generally presume that Congress does not lightly preempt state law. *Medtronic Inc. v. Lora Lohr*, 116 S. Ct. 2240, 2250 (1996).

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14. *See also* comparable state responsibilities under the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, and the Safe Drinking Water Act, Pub. L. No. 93-523.

Also, preemption does not deprive the states of the "power to regulate where the activity regulated [is] a merely peripheral concern" of Federal law. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). *See CSX Transportation v. Easterwood*, 507 U.S. 658 (1993) (federal regulations adopted by the Secretary of Transportation under the Federal Railroad Safety Act preempt negligence action only insofar as it was alleged that petitioner's train was traveling at an excessive speed).

In short, where the state or local law can be applied without interfering with the Federal law, the courts have done so. *See Hayfield Northern R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984) (state proceeding to condemn railroad property did not interfere with the Interstate Commerce Act because the state process followed the abandonment of the line pursuant to the ICC's process and the line was no longer part of the national transportation system). Local law, however, is preempted when the challenged state statutes "stands as an obstacle to the accomplishment and execution to the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1971), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Local law also is preempted where there is a compelling need for uniformity. *Hammond*, 726 F.2d at 491. We believe that there is such a need in connection with the interstate rail system, which spans every state in the Continental United States.

As a result, we believe that state or local laws that would impose a local permitting or environmental process on BN's operations on, or maintenance or upgrading of, the Stampede Pass line are preempted to the maximum extent permitted by the Constitution. As explained in *King County* and the Secretary's informal opinion, an incident of the carrier's receipt

of authority to construct a line is the right to maintain and improve it to keep it in operable condition.[15] This is necessary to remedy wear and tear and to meet the changing needs of the market for rail services by, for example, enlarging or raising tunnels to accommodate bigger cars, raising towers to employ new communication systems, or replacing sidings to accommodate more traffic. Moreover, a state or local permitting process implies the power to deny authorization, which could frustrate the activity that is subject to federal control. If BN were unable to undertake the projects, or if its ability to commence projects to maintain and upgrade its facilities were substantially delayed pending resolution of a state or local permitting or environmental process, its ability to carry rail traffic over the Stampede Pass line could be greatly inhibited, if not foreclosed. Given these circumstances, it appears that state or local permitting or environmental requirements would both interfere with the federal licensing program and unreasonably burden interstate commerce.

At the same time, we agree with the Secretary's informal opinion that there are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution. For example, even in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, as noted by the Secretary, a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad

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15. *See, e.g., Detroit/Wayne Port Authority v. ICC*, 59 F.3d 1314, 1317 (D.C. Cir. 1995) (while initial construction of a rail line requires authority from the Board, improvements to existing lines do not require an additional license or environmental review).

construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden on, or interfere with, interstate commerce. Therefore, such requirements are not preempted.

We also agree with the Cities that state or local laws providing for permitting and environmental review, in other areas, need not be found to discriminate against interstate commerce. This process, initiated in the state legislature or local governing body, is ordinarily within the localities' legitimate policing powers. However, where the local permitting process could be used to frustrate or defeat an activity that is regulated at the Federal level, the state or local process is preempted. Here, the Cities' admitted goal is to constrain BN's train operations that we have already approved in *BNSF Control* in order to force BN to fund infrastructure improvements related to the line. For example, Charles A. Booth, mayor of the City of Auburn, has indicated that:

> We do not appreciate having to devote substantial effort to thwarting the Railroad's plans but their actions leave little other choice.
>
> We are told the benefit of separated grade crossings accrue mostly to the citizens, therefore, the expense of constructing such should be a local responsibility. All the City has ever asked is that those who benefit or profit from the "improvements" be responsible

for cleaning up the mess and mitigating the negative impacts upon the City.[16]

See also, the County's petition for declaratory order in *King County*, filed August 27, 1996, where, in view of the City of Auburn's threatened court action against the County, the County requested our formal decision on whether BN can be required, through the local permitting process, to construct overpasses, underpasses, and natural or artificial noise barriers to mitigate the effects of increased train traffic through the City.

Petitioners' claim that we ignored or overlooked their local concerns is unfounded. As noted (*see supra* note 11), in *BNSF Control* the Board engaged in an appropriate environmental review under NEPA and our environmental rules and adopted environmental mitigation conditions to address the environmental concerns that had been raised during the environmental review process by petitioners and others, including mitigation in the City of Auburn.[17] Petitioners cannot use this declaratory order proceeding to mount a collateral attack on, or seek to substitute a state or local environmental review process for, the agency's environmental review under NEPA in *BNSF Control.*[18] *See Toye Bros. Yellow Cab Co. v.*

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16. City of Auburn letters to the Board, dated May 15 and October 21, 1996.

17. The environmental impacts on the City of Kent were not considered because SEA found that Kent was not on the Stampede Pass line and would incur no direct environmental impacts. Moreover, evidence of record in that case showed that rail traffic in Kent will decrease by an average of one train a day as a result of the reopening of the Stampede Pass line to transcontinental traffic.

18. It is noteworthy here that the State is *not* attempting to apply its own environmental review.

Irby, 437 F.2d 806, 810 (5th Cir. 1971). Rather, what we said on the environmental issues that were addressed there is conclusive, subject to the right of the Cities (or any other interested parties) to seek judicial review, under the appropriate standards, if they are dissatisfied with the scope or outcome of the agency's NEPA process.[19]

We did not review the construction aspects of BN's improvements because *BNSF Control* was an inter-carrier consolidation under 49 U.S.C. 11323-25, rather than a construction project under 49 U.S.C. 10901. We therefore appropriately limited our environmental review to the operational changes that we were approving. Had this been a construction case, any reasonable concerns relative to BN's compliance with local land use and building codes would have been considered in detail in our environmental review and our decision.

Petitioners complain that our decision in *King County* creates a regulatory void that Congress could not have intended. In such instances, according to the Cities, the states may impose their own oversight authority. As an example, petitioners maintain that states have residual regulatory authority over spur or switching tracks that are expected from our jurisdiction pursuant to 49 U.S.C. 10906. Under section 10501(b)(2) of ICCTA, however, we have "exclusive" jurisdiction over spur or switching tracks located entirely in one state. When sections 10906 and 10501(b)(2) are read together, it is clear that Congress intended to remove our authority over the entry and exit of these auxiliary tracks, while still preempting state jurisdiction over them, leaving the construction and disposition

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19. As noted, the Cities' environmental court challenge of *BNSF Control* is currently pending in the Ninth Circuit.

of auxiliary tracks entirely to railroad management. *See* Conference Report on ICCTA, explaining that section 10501(b)(2) was added "[i]n light of the exclusive Federal authority over auxiliary tracks and facilities * * * " H.R. Rep. No. 104-422, 104th Cong., 1st. Sess. 167 (1995).[20] Thus, although we may not regulate the construction and disposition of spur and switching tracks, it is equally clear that state and local authorities may not regulate those activities either.[21] *See*,

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20. The Cities' reliance on *Illinois Commerce Comm'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989), is misplaced. In that case, the court concluded that the states had jurisdiction over abandonments of spur track under section 10907(b)(1) of the former Interstate Commerce Act. *Illinois Commerce Comm'n*, however, was expressly overruled by Congress in ICCTA through the enactment of section 10501(b)(2).

The Cities incorrectly suggest that the local permitting they seek to impose is only peripheral to and not in conflict with the Board's jurisdiction. As we stated in *King County*, at p. 4:

> the permitting process implies the power to deny authorization and thereby to frustrate the activity that must be sanctioned. If BN[ ] were unable to undertake the projects, or if its ability to commence projects to maintain and upgrade its facilities were substantially delayed pending resolution of environmental issues, its ability to carry rail traffic over the Stampede Pass line could be greatly inhibited, if not foreclosed. Given these circumstances, it appears that the county permitting process contemplated for this project would both interfere with the federal licensing program and unreasonably burden interstate commerce. Accordingly, it would be preempted by the ICCTA.

21. The Cities concede that section 10501 contains express preemption language, but argue that the section does not govern the

(Cont'd)

e.g., *Morales v. Trans World Airlines*, 504 U.S. 374 (1992); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988). *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409 (1986); *G&T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230 (3d Cir. 1987), *cert. denied*, 485 U.S. 988 (1988).

As BN states, Congress would not have totally preempted the states from regulating the construction, operation, and abandonment of spur and switching tracks in ICCTA if it had intended to permit continued state regulation — through a permitting process or otherwise — of main line interstate trackage, such as the Stampede Pass line, which has a significant impact on interstate commerce. *See* H.R. Rep. No. 104-311. 104th Cong., 1st Sess. 95 (1995) ("Although States retain the

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(Cont'd)
local environment, land use, or building permit regulatory authority they seek to have enforced. However, section 10501(b)(2) grants the Board *exclusive* jurisdiction over rail transportation and the "practices, routes, services, and facilities" of rail carriers. Section 10102(9) in turn broadly defines "transportation" as including "a locomotive, car, vehicle, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, and services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property. . . ." The Stampede Pass line plainly is "property," a "facility," or a "route" used in "transportation by [a] rail carrier." Moreover, BN's operations over, and repair and upgrading, that line are "services related to the movement . . . of . . . property." In short, the Stampede Pass line constitutes property and facilities subject to the exclusive jurisdiction of the Board. That jurisdiction encompasses the original licensing and construction of the line, subsequent maintenance and upgrade projects on the line, and BN's operations over the line.

police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme minimal regulation for this intrinsically interstate form of transportation.")

Finally, we note that none of BN's Stampede Pass construction projects criticized by petitioners is located within their municipal boundaries or jurisdiction.[22] As noted, it is apparent that petitioners' primary concern is the increased level of train traffic through their respective cities. After reviewing the Cities' concerns in this regard, we specifically addressed the operational impacts of BN's acquisition in *BNSF Control* and imposed appropriate environmental mitigation measures. The Cities are clearly dissatisfied with the environmental mitigation we imposed, but that does not justify their application of local land use and building codes to force BN to make additional concessions. We think that their effort to do so results in an unreasonable burden on interstate commerce. In addition, the Cities' attempt to use local law in such a manner constitutes an improper collateral attack on our decision in *BNSF Control*. Therefore, while we have clarified *King County* to make it clear that state and local entities have important roles in implementing various federal statutes, we agree with that decision's ultimate ruling that state or local permitting or environmental review of BN's upgrading of the Stampede Pass line goes too far, and that Congress intended to preempt all regulation of this project under state law or local ordinances to the maximum extent permitted by the Constitution.

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22. The proposed snow sheds, communications towers, service facilities buildings, and parking lots are located outside petitioners' city limits.

Appendix B

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request to intervene by King County, WA, is granted.

2. The Cities' petition for declaratory order will be treated as a petition for reconsideration of *King County*.

3. *King County* is modified to the extent discussed above. In all other respects, the petition for reconsideration of *King County*, and the Cities' petition for declaratory order, are denied.

4. This proceeding is terminated.

5. This decision is effective 30 days from the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX C — DECISION OF THE SURFACE TRANSPORTATION BOARD DATED AND DECIDED SEPTEMBER 25, 1996

SURFACE TRANSPORTATION BOARD[1]

DECISION

STB Finance Docket No. 33095

KING COUNTY, WA — PETITION FOR DECLARATORY ORDER — BURLINGTON NORTHERN RAILROAD COMPANY — STAMPEDE PASS LINE

STB Finance Docket No. 32974

BURLINGTON NORTHERN SANTA FE CORPORATION, BNSF ACQUISITION CORP., AND BURLINGTON NORTHERN RAILROAD COMPANY — CONTROL — WASHINGTON CENTRAL RAILROAD COMPANY

Decided: September 25, 1996

By petition filed August 21, 1996, in Finance Docket No. 33095, King County, WA (County), seeks institution of a declaratory order proceeding to determine whether the ICCTA preempts the County from requiring that the Burlington Northern Railroad Company (BNRR) obtain permits from the

1. The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). This decision relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10501 and 10901.

County before undertaking certain improvements on BNRR's Stampede Pass line in Kings County, Washington. The County states that it is a municipal subdivision of the State of Washington, and is authorized under its constitutional police powers to adopt and enforce land use and environmental laws and to conduct land use planning and permit review.[2]

BACKGROUND

According to the petition, BNRR and its predecessors have operated the Stampede Pass line between Auburn and Pasco, WA, since 1888 as a main line route serving the Pacific Northwest. In 1983, BNRR allegedly downgraded the Stampede Pass line to carry local traffic. In 1986, BNRR sold a segment of the Stampede Pass line between Cle Elum and Pasco, WA, together with several branch lines, to the Washington Central Railroad Company (WCRC). BNRR continued to provide limited local service over the remaining segment of the Stampede Pass line between Auburn and Cle Elum (including the portion of the line within the County).

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2. The City of Auburn has filed a pleading stating that it is an interested party with respect to King County's petition and that, in furtherance of these interests, the City is preparing its own petition to the Board, to be filed in STB Finance Docket No. 33095. The City further requested that we defer action on the County's petition until we have had an opportunity to consider the City's position.

While the City is free to seek a declaratory order, if it wishes, it has offered no reason for the Board to delay responding to King County's petition. The answer to the question presented by King County is sufficiently straightforward that we need not seek or consider public comment in issuing our order. The City of Auburn is not prejudiced by our issuing a prompt response to King County's petition, because, as noted, the City may file its own, in a separate docket.

Appendix C

Because of an asserted increasing demand for rail service, BNRR is now proposing to reacquire the segment sold to WCRC and reestablish the Stampede Pass line as a main line for through traffic. To that end, in an application filed June 17, 1996, in STB Finance Docket No. 32974, the Burlington Northern Santa Fe Corporation. (BNSF), BNSF Acquisition Corp. (BNSF Acquisition), BNRR and WCRC (collectively, applicants) are seeking approval under 49 U.S.C. 11323-25 for BNSF to continue in control of BNSF Acquisition, its noncarrier subsidiary, after BNSF Acquisition acquires the common stock of, and subsequently merges with, WCRC. Applicants are also seeking approval under 49 U.S.C. 11323 for BNRR to operate WCRC's segment of the Stampede Pass Line between Cle Elum and Pasco, WA, and connected branch lines.

On September 4, 1996, the Board's Section of Environmental Analysis (SEA) issued an environmental assessment (EA) of BNRR's proposed operation over the Stampede Pass line, including the segment of the line within the County. The EA did not consider any proposed construction or improvements to the line but addressed the anticipated impacts of an increase in train traffic on the entire Stampede Pass line. Based on a projected increase of 10 trains per day on the line, SEA concluded that the proposal would not have significant environmental impacts if the mitigation measures recommended in the EA are implemented. The County and a number of other governmental organizations were consulted by SEA in preparing the EA. Comments on all aspects of the EA are due October 4, 1996. SEA will issue final recommendations after reviewing the comments, which we will consider in our final decision on the application.

As part of the proposed operation over the Stampede Pass line, BNRR apparently is also planning to repair and upgrade

portions of the Stampede Pass line within the County, including: (1) replacing track sidings; (2) replacing maintenance-of-way buildings; (3) raising heights of tunnels; (4) replacing snowsheds and (5) installing communications towers. The County contends that some of the line repairs planned by BNRR would ordinarily require permits after environmental review under state environmental laws. It asserts that while BNRR initially submitted permit applications for the line improvements, the carrier now contends that the County's review process is preempted by the Board's authority under the ICCTA.

On May 8, 1996, the County asked the Board for an informal opinion as to whether the ICCTA preempts the County's authority to evaluate or condition BNRR's proposed operations of the Stampede Pass line within the County and to issue grading, building or conditional use permits for construction. BNRR joined the County's request on May 31, 1996.

On June 20, 1996, the Secretary of the Board issued an informal opinion indicating that the County's permitting process appeared to be preempted by the ICCTA. The Secretary noted that the County, through the permitting process, could deny BNRR authority to undertake the improvements to the Stampede Pass line and thus could inhibit BNRR from carrying traffic on the line. As a result, he concluded that the state or local permitting process appeared to interfere with the federal licensing program and unreasonably burden interstate commerce. The opinion further stated that, under its local police powers, the County could nonetheless continue to police certain deleterious actions, such as dumping waste and could issue citations or seek damages if there were a spill of harmful

substances while a railroad line was being constructed or upgraded.

The County states that shortly after the informal opinion was issued, BNRR withdrew its pending permit applications in the County.

In its petition for declaratory order, the County submits that the Secretary's informal opinion has not resolved the question of preemption in this case. It requests that the Board clarify whether and to what extent the County is preempted from permit review and directing mitigating measures for construction associated with the Stampede Pass project.[3] Specifically, the County asks us to clarify whether it is preempted from requiring permit applications from BNRR: (1) to mitigate noise impacts of rail line operations in residences located near the line by installing natural or artificial noise barriers; (2) to mitigate traffic congestion impacts of rail line operations by building overpasses or underpasses or other means; (3) to demonstrate the structural integrity of snowsheds to be built at Stampede Pass tunnel; (4) to provide contingent mitigating plans for potential discharge or spill of material transported along lakes and streams and other segments of the line; and (5) to study and mitigate impacts on wetlands, streams, or other natural systems along the rail right-of-way within the County.

DISCUSSION AND CONCLUSIONS

The Board's authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory decision is discretionary. We will

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3. The Cities of Kent and Auburn also have requested a ruling from us on local government preemption.

exercise that authority here to eliminate controversy and remove uncertainty over our view of the appropriate role of state and local government entities and this Board in regulating the environmental effects of BNRR's planned reactivation of its Stampede Pass line.

We agree with the Secretary's informal opinion that the County's permitting process for prior approval of this project of necessity impinges upon the federal regulation of interstate commerce. The power to authorize the construction of rail lines and the power to authorize railroads to operate over them has been vested exclusively in the Board by section 10901 of the ICCTA. The ICCTA abolished the ICC, established the Board as the successor to the ICC, and revised the Interstate Commerce Act, all effective January 1, 1996. The Board now has exclusive jurisdiction over the construction and operation of rail lines that are part of the interstate rail network, pursuant to 49 U.S.C. 10501 and 10901. The ICC and court precedents cited herein regarding the ICC's preemptive authority now apply to the Board's authority. See ICCTA Section 205.

In the Transportation Act of 1920, Congress established a comprehensive scheme of federal regulation of track additions and deletions by interstate railroads like BNRR.[4] *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981) (*Kalo Brick*) (ICC abandonment authority is "plenary" and "exclusive"); *Transit Comm'n v. United States*, 289 U.S. 121 (1933) (*Transit Comm'n*) (same for construction). Thus, any state or local statute that requires a railroad to obtain state or

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4. The BNRR line through Stampede Pass was built before Congress gave the ICC the authority to approve the construction of rail lines, but authority for the line was "grandfathered" under the provisions of the statute.

local approval before construction (or abandonment) of a line would appear, on its face, to conflict with the ICCTA and is preempted.

Moreover, under the Commerce and Supremacy Clauses of the United States Constitution, direct regulation of interstate commerce by the states is prohibited. E.g., *Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982); *Kalo Brick*, 450 U.S. at 318; *Missouri Pac. R.R. v. Stroud*, 267 U.S. 404, 408 (1925) ("there can be no divided authority over interstate commerce . . . the Acts of Congress on that subject are supreme and exclusive"). Indeed, Congress in the ICCTA has confirmed that the jurisdiction of the Board over transportation by rail carriers like BNRR is exclusive and preempts the remedies provided under federal or state law. 49 U.S.C. 10501(b).

Preemption, however, does not withdraw from the states the "power to regulate where the activity regulated [is] a merely peripheral concern" of federal law, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959). In other words, the ICCTA does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads. But the local law is preempted when the "challenged state statute 'stands as an obstacle to the accomplishment and execution to the full purposes and objections of Congress.' " *Perez v. Campbell*, 402 U.S. 637, 649 (1971), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

A key element in the preemption doctrine is the notion that only "unreasonable" burdens are stricken down. Not all state and local regulations that affect interstate commerce fail. Only those that "conflict with" federal regulation, "interfere

with" federal authority, or "unreasonably burden" interstate commerce are preempted.

In short, where the state or local law can be applied without interfering with the federal law, the courts have done so. Thus, in *Hayfield Northern R.R. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984), the Supreme Court held that a state proceeding to condemn railroad property did not interfere with the Interstate Commerce Act because the state process followed the abandonment of the line pursuant to the ICC's process and the line was no longer part of the national rail network.

While it is difficult to draw the line between what type of regulation is, and is not, preempted without a thorough analysis of the particular ordinances at issue, it appears that requiring a permit for BNRR's operations or maintenance and upgrading plans for the Stampede Pass line would go too far. An incident of a carrier's receipt of authority to construct a line is the right to maintain and improve it to keep it in operable condition. This is necessary to remedy wear and tear and to meet the changing needs of the market for rail services by, for example, enlarging or raising tunnels to accommodate bigger cars, raising towers to employ new communications systems, or replacing sidings to accommodate more traffic.

Moreover, the permitting process implies the power to deny authorization and thereby to frustrate the activity that must be sanctioned. If BNRR were unable to undertake the projects, or if its ability to commence projects to maintain and upgrade its facilities were substantially delayed pending resolution of environmental issues, its ability to carry rail traffic over the Stampede Pass line could be greatly inhibited, if not foreclosed. Given these circumstances, it appears that the county permitting

process contemplated for this project would both interfere with the federal licensing program and unreasonably burden interstate commerce. Accordingly, it would be preempted by the ICCTA.

In addition to reiterating the overall question of federal preemption that the County propounded in its request for an informal opinion, the County asked five specific questions on Board preemption of County permitting requirements directed at mitigating 5 specific environmental impacts. Although the objects of each request differ, the method to be employed is the same: obtaining a permit from the County. Because, as noted, the permitting process by its nature impinges upon federal regulation, that process itself is objectionable, regardless of its objectives.

It should be noted that the Board is conducting an environmental review of BNRR's proposed operation of the *entire* Stampede Pass line in STB Finance Docket No. 32974, including the segment within the County. The Board has thereby assumed the exclusive role in imposing mitigating conditions in connection with its consideration of the application before it. The EA, which was issued on September 4, 1996, considered the environmental impacts of BNRR's proposed operation of the Stampede Pass line. Among the impacts considered in the EA were those on traffic, noise, safety, and other matters, which are the same impacts the County seeks to regulate through its permitting process. The EA has recommended certain mitigating conditions addressing traffic and safety concerns, which would require BNRR to notify towns along the line of its expected schedule of train operations and work with them on emergency response measures. BNRR also would be required to consult with appropriate state and local government agencies

to discuss funding options and develop a priority list for upgrading crossing signals and to transport all hazardous materials in compliance with federal standards. The County has the opportunity to comment on SEA's recommendations for mitigation as well as other aspects of the EA by October 4, 1996.[5] SEA will consider these comments and the environmental record in making its final recommendations. The Board will then consider those recommendations in imposing environmental conditions upon any final decision approving the application. Absent conditions imposed by the Board, requiring approval by a state or local government agency, such agencies are totally preempted from regulating the environmental consequences of the transaction.

The informal opinion issued by the Secretary presupposed that there would be no federal approval of the proposal to upgrade and modernize the Stampede Pass line. Had BNRR's proposal not required federal approval, we agree with the view expressed therein that a state or local government has a limited role under other federal statutory schemes, such as the Clean Air Act, involving protection of the environment and, to some extent, as a result of the state's recognized police powers, to protect the health and welfare of its citizens. But outside of that limited role, a state or local government may not use its

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5. We note that SEA extended to October 4, 1996, the original time period for filing comments to the EA. This extension has been made to ensure that petitioner has the opportunity to comment on the EA, and SEA's recommended mitigating conditions, as well as to propose additional mitigating conditions that it believes are necessary. This extension of the EA comment period will delay our decision in STB Finance Docket No. 32974 by 10 days. We now expect to issue a final decision on the application by October 25, 1996, with an effective date of October 30, 1996.

permitting authority to impede or unreasonably interfere with interstate commerce. However, where, as here, approval of a transaction is required at the federal level with the result that the environmental effects of that approval are required to be assessed at the federal level, there is no role for state and local agencies to play other than by participation in the Federal environment review process.

Accordingly, we will deny the County's petition.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The County's petition for declaratory order in STB Finance Docket No. 33095 is denied.

2. This decision is effective on the service date.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams.
Secretary

APPENDIX D — DECISION OF THE SURFACE TRANSPORTATION BOARD DATED AND DECIDED OCTOBER 24, 1996

SURFACE TRANSPORTATION BOARD[1]

DECISION

STB Finance Docket No. 32974

BURLINGTON NORTHERN SANTA FE CORPORATION, BNSF ACQUISITION CORP., AND BURLINGTON NORTHERN RAILROAD COMPANY — CONTROL — WASHINGTON CENTRAL RAILROAD COMPANY

Decided: October 24, 1996

By application filed June 17, 1996, the Burlington Northern Santa Fe Corporation (BNSF), BNSF Acquisition Corp. (Acquisition), Burlington Northern Railroad Company (BNRR) and Washington Central Railroad Company (Washington Central) (collectively, Applicants) seek approval under 49 U.S.C. 11323-25 for BNSF to continue in control of Acquisition, its non-carrier subsidiary, after Acquisition acquires the common stock of and subsequently merges with Washington Central. Applicants also seek approval, under 49 U.S.C. 11323, for BNRR to operate the Washington Central's 151-mile main line between Pasco and Cle Elum, WA, and the

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1. The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board). This decision relates to railroad acquisitions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323-25.

following connecting branch lines: (1) the 28.6-mile branch line between Gibbon and Granger, WA; (2) the 13.1-mile branch line between Yakima and Naches, WA; (3) the 8.1-mile branch line between Yakima and Moxee City, WA; and (4) the 18.7-mile branch line between Kennewick and Richland, WA. BNRR also proposes to assume Washington Central's obligations to operate over the Yakima Branch line of the Union Pacific Railroad Company (UP) between Kennewick and Yakima, WA.[2]

In a notice served and published on July 17, 1996 (61 FR 37313), we accepted the application and determined that this is a minor transaction as defined in 49 CFR 1180.2(c).[3] We

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2. Applicants also propose to lease WCRC's remaining lines to the Columbia Basin Railroad Company (CBRC). Those lines are from: (1) Connell (MP 186.9) to Wheeler, WA (MP 147.3); (2) Bassett Junction (MP 0.0) to Shrag, WA (MP 12.50); and (3) Moses Lake (MP 18.3) to Sieler, WA (MP 5.0). In addition, BNRR proposes to grant CBRC trackage rights to provide local service over BNRR's 13-mile line between Warden (MP 1976.0) and Othello, WA (MP 1989.0). The Applicants state that authority for the lease and trackage rights would be sought in a separate proceeding before the Board.

3. This transaction is subject to the standards of 49 U.S.C. 11324(d), because the transaction does not involve the merger or control of two Class I railroads. Section 204(a) of the ICCTA provides that all ICC rules in effect on the date of the enactment of the ICCTA "shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the Board . . . or operation of law." While the standards and procedures of former sections 11343-45 and current sections 11323-25 are substantially similar insofar as minor transactions are concerned, the procedures of current section 11325(d) differ slightly from those at 49 CFR 1180.4 and shall govern. Otherwise, the use of the regulations at 49 CFR part 1180 for this proceeding appears proper.

invited comments from interested parties, including the Secretary of Transportation and the Attorney General of the United States, by August 16, 1996. We gave the Applicants until August 30, 1996, to reply to any comments.

Comments were filed by: the Washington State Department of Transportation (WSDOT); the Ports of Seattle and Tacoma, WA (collectively, the Ports); North Dakota Public Service Commission (NDPSC); The Beach Co-operative Grain Company, Berthold Farmers Elevator, North Dakota Farm Bureau, North Dakota Grain Dealers Association, North Dakota Grain Growers Association, and North Dakota Wheat Commission (collectively, ND Grain Producers); Cities of Kent and Auburn, WA (Cities); Rail Services Update (Update); United Transportation Union (UTU); and John D. Fitzgerald, General Chairman for the United Transportation Union located in Vancouver, WA (WA-UTU).[4] Applicants replied.

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4. In addition, on October 17, 1996, the Board received a letter from Representative Jennifer Dunn of the Eighth Congressional District of Washington. Representative Dunn refers to the "Board's decision not to hold a hearing on this matter" and asks that the Board refrain from issuing a decision in this case "until the issues raised in this proceeding are addressed in a hearing." Like almost all proceedings before the Board, this case is being considered on a written record. Representative Dunn has given no reason why a written record is inadequate in this proceeding, and has noted no deficiencies in the record before us. Nor have we received such an argument from any party to the proceeding. We will therefore deny the request.

Appendix D

BACKGROUND

Overview

Applicants state that the transaction will enable BNRR to reestablish its former Stampede Pass route as a third main line for traffic to and from the ports of Seattle and Tacoma and the area around Puget Sound. Prior to 1983, BNRR operated three overhead main lines serving the area: (1) the Cascade route from Spokane, WA, through Wenatchee, WA, to Seattle and Tacoma, WA; (2) the Columbia River route between Spokane and Seattle and Tacoma via Pasco and Vancouver, WA; and (3) the Stampede Pass route between Auburn and Pasco, WA.

In 1983, BNRR downgraded the Stampede Pass route by limiting it to the carriage of local traffic, assertedly because the railroad had adequate capacity on its two other routes. In 1986, BNRR sold a 151-mile portion of the Stampede Pass route between Cle Elum and Pasco, and several branch lines to the Washington Central, which was then a new short-line carrier. BNRR continued to operate the remaining 77.9-mile portion of the Stampede Pass route between Cle Elum and Auburn to provide limited local service.

Applicants indicate that they now propose that BNSF reacquire the segment it sold to Washington Central to reestablish the Stampede Pass route as a main line for through traffic. They project that intermodal and grain traffic will soon exceed BNRR's capacity on the Cascade and Columbia River routes. BNSF also expects traffic to increase because of the recently approved BNRR/ATSF consolidation. The Applicants indicate that reestablishing the Stampede Pass route is the lowest-cost alternative to improve capacity to handle increased

business and meet expected demand. Applicants propose to accomplish this by having BNSF acquire operational and financial control over Washington Central's lines.

The Applicants

BNSF is a non-carrier corporation, which indirectly owns BNRR[5] and The Atchison, Topeka, and Santa Fe Railway Company (ATSF).[6] BNSF's control of the BNRR/ATSF system was approved in *Burlington Northern, Inc. & Burlington Northern Railroad Company — Control & Merger — Santa Fe Pacific Corporation, and The Atchison, Topeka and Santa Fe Railway Company*, __ I.C.C.2d __ (served Aug. 23, 1995). BNSF also controls several rail carriers and holds stock interest in other regional operating and terminal railroads subject to our jurisdiction.

Acquisition is a non-carrier, wholly owned subsidiary of BNSF. Acquisition was formed to acquire Washington Central.

BNRR is a Class I railroad that operates approximately 25,000 miles of railroad in the United States and Canada.

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5. BNRR is directly owned by Burlington Northern, Inc. (BNI). Applicants indicate that BNI has not been made an applicant to this proceeding because it is not a party to the merger agreement. BNI will not acquire control of Acquisition or WCRC and will not operate WCRC's lines.

6. ATSF is directly owned by Santa Fe Pacific Corporation (SFP), a non-carrier holding company. Applicants indicate that ATSF and SFP are not included as applicant carriers in this transaction because neither is a party to the merger agreement nor would they effect control over WCRC's lines. Moreover, they state, ATSF's lines do not connect with and will not be consolidated with WCRC's lines.

Appendix D

BNRR's principal routes run from the Pacific Northwest across Montana, North Dakota, Minnesota and the western edge of Wisconsin to Chicago; from the Powder River Basin in Wyoming through Lincoln, NE, to Chicago, IL and Kansas City, MO; from the Powder River Basin to Denver, CO, and Fort Worth, TX; from the Powder River Basin to Bismarck, ND and Minneapolis/St. Paul, MN, with an auxiliary line to the Head of the Lakes; from Denver, CO to Chicago with a junction at Lincoln, NE; from Avard, OK east to Memphis, TN and Birmingham, AL; and from Chicago to Houston, TX through Kansas City and Dallas, with an auxiliary line from St. Louis, MO to a junction point east of Tulsa, OK.

Washington Central is a Class III rail carrier that operates approximately 303.2 miles of rail line within the State of Washington. Washington Central acquired its lines from BNRR in 1986.[7] In addition, Washington Central serves customers on UP's Yakima Branch under a trackage rights and haulage agreement dated April 7, 1992.[8]

The Proposed Transaction

The terms of the transaction are contained in an agreement among BNSF, Acquisition and Washington Central dated April 18, 1996. The agreement provides that Acquisition will acquire

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7. *See Washington Central Railroad Company, Inc. — Exemption Acquisition and Operation — Burlington Northern Railroad Company*, Finance Docket No. 30916 (ICC served Oct. 3, 1986).

8. The trackage rights agreement was the subject of a notice of exemption in *Washington Central Railroad Company — Trackage Rights — Union Pacific Railroad Company*, Finance Docket No. 32051 (ICC served June 1, 1992).

all the common stock of Washington Central, and it will be merged into Acquisition. Each share of Washington Central's common stock will be canceled and converted into the right to receive an adjusted fraction of a share of BNSF common stock. Immediately prior to the closing of the merger agreement, Washington Central will buy out all shares of the Washington Central's preferred stock (and common stock, if any) owned by the Washington Central Railroad Employee Stock Ownership Trust (ESOP). The ESOP will repay to Washington Central the outstanding amount of principal and interest due as of that time pursuant to the ESOP Loan and Pledge Agreement, dated May 4, 1994, between Washington Central and the Washington Central ESOP.

Applicants will consolidate the railroad operations of BNRR and Acquisition. Although Acquisition and BNRR will be marketed as part of the BNSF rail system, BNSF says that Acquisition will retain its separate existence and will not be merged into BNRR at the present time. After the merger, BNRR will operate the Washington Central's segment of the Stampede Pass route and connected branch lines.

According to Applicants, this transaction will not lessen competition. Reestablishing the Stampede Pass route will assertedly enable the BNSF system to improve capacity and reduce congestion in the Pacific Northwest area. The transaction, they say, will also provide additional routing and service options to shippers, improve transit times and car supply, and result in a more efficient operation. Applicants also expect to serve customers on BNSF's recently combined system more efficiently, thus enhancing competition for transportation into and out of the PNW. Additionally, shippers on the Washington Central will allegedly continue to have the same

competitive options available to them, and their points of connection will remain the same. Applicants maintain that the transaction will improve the competitive balance that currently exists today, but will not create a monopoly or restrain trade in freight surface transportation in any particular region of the United States.

BNRR states that, for the reasonably foreseeable future, it intends to use the Stampede Pass route for a total of approximately 10 daily overhead trains that are presently operating over the Cascade and Columbia River routes. The 10 trains include 4 merchandise trains, 3 loaded grains trains, and 3 empty grain trains.

The 4 merchandise trains operate over 4 separate routes. One east-bound merchandise train currently operates between Seattle and Pasco over the Columbia River route and moves through the cities of Auburn and Kent. After the merger, this train will continue to move through Kent and Auburn and then turn east on the Stampede Pass route to Pasco. A second east-bound merchandise train presently operates between Tacoma and Pasco via the Columbia River route. After the merger, this train will operate north from Tacoma to Auburn and then east across the Stampede Pass route to Pasco. It will not operate through Kent. A third west-bound merchandise train presently operates between Pasco and Seattle over the Columbia River route through both Auburn and Kent. After the merger, this train will operate from Pasco over the Stampede Pass route to Auburn and then north through Kent to Seattle. The fourth west-bound merchandise train presently operates between Pasco and Tacoma, and does not operate either through Auburn or Kent. After the merger, this train will operate from Pasco over the Stampede Pass route to Auburn and then south to Tacoma. It will not operate through Kent.

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The 3 loaded grain trains currently operate over 2 routes. Two of the loaded west-bound grain trains presently operate between Pasco and Tacoma over the Columbia River route and do not move through either Auburn or Kent. After the merger, the trains will operate from Pasco west over the Stampede Pass route to Auburn and then south to Tacoma. They will not move through Kent. The third loaded west-bound grain train presently operates from Pasco to Seattle over the Columbia River route through Auburn and Kent. After the merger, this train will operate west from Pasco over the Stampede Pass route to Auburn and then north through Kent to Seattle.

The 3 empty grain trains now also operate over 2 routes. Two of the empty east-bound grain trains presently move over the Cascade route from Tacoma to Spokane through both Auburn and Kent. After the merger, these trains will operate north from Tacoma to Auburn and then east over the Stampede Pass route to Pasco. They will no longer move through Kent. The third east-bound empty grain train presently moves from Seattle to Spokane over the Cascade route. It does not move through either Auburn or Kent. After the merger, the train will operate south from Seattle through Kent to Auburn. At Auburn, the train will move east over the Stampede Pass route to Pasco.

Additionally, BNRR proposes to provide local service between (1) Pasco and Cle Elum; (2) Gibbon and Granger; (3) Yakima and Naches; (4) Yakima and Moxee City; and (5) Kennewick and Richland. BNRR's local service will essentially be the same as is provided today by Washington Central, but operations could change if additional traffic becomes available. BNRR will provide local service at Kennewick out of its Pasco Yard.

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Acquisition will also assume Washington Central's obligations under the trackage rights agreement with UP. BNRR will operate UP's Yakima Branch to serve UP customers on that line. Washington Central's trackage rights with UP will be assigned to BNRR. BNRR will perform the same level of switching that Washington Central performs today for those UP customers.

BNRR initially had considered using the Stampede Pass route for scheduled double-stack intermodal service, and had planned to expand the Stampede Pass tunnel to accommodate this traffic. BNRR states that it has since determined that it will not use the Stampede Pass route for double-stack intermodal traffic for the reasonably foreseeable future, but will use its other lines for this traffic. Rerouting a total of approximately 10 trains over the Stampede Pass route will assertedly free up track capacity on BNRR's other Pacific Northwest routes for movements of double-stack traffic. BNRR states that it has no plans to expand the Stampede Pass tunnel for the reasonably foreseeable future, and that no capital funds to expand the tunnel have been allocated through 1999.

Applicants expect that BNRR will realize significant operating benefits by using the Stampede Pass Route. Because of the shorter distances over the route, rerouting the merchandise and loaded grain trains will reduce ton miles, car miles, locomotive unit miles, and train miles. The 3 empty grain trains, however, will have to travel a longer distance over the Stampede Pass route than over the Cascade route. BNRR expects to realize annual savings of $15.24 million as follows:

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Category	Miles Saved	Savings
Train Miles	226,260	$1,241,010
Locomotive Miles	495,786	768,187
Car Miles	21,751,997	2,451,602
Ton Miles	3,468,970,909	7,958,686
		$12,419,485

The train reroutes will also produce substantial fuel savings of approximately 4.5 million gallons of diesel fuel per year. At current fuel prices of an average of $.63 per gallon, the reroutes described above will produce annual savings of about $2.83 million, resulting in the total savings figure of $15.24 million.

Applicants state that the reroutes will also enable the Columbia River route to handle an additional 7 trains per day to carry traffic to and from points such as Portland, OR, Vancouver, WA, and Kalama, WA. Rerouting the empty grain trains is expected to improve BNRR's ability to provide intermodal service over the Cascade route. The rerouted empty grain trains will move directly into the Pasco Yard for classification before movement to loading points on the BNRR system. BNRR has indicated a preference for classifying empty grain cars at its Pasco Yard because its facilities at Spokane and Hauser, ID, were not designed for this function and are often congested during the periods of heavy grain movements.

Comments

WSDOT states that the transaction would be in the best interests of shippers in the State of Washington. It believes that the proposal would enhance rail service and increase main line rail capacity across the state. WSDOT indicates that the

rail network is an important element of the state's multimodal transportation network. WSDOT contends that container traffic through Puget Sound ports is projected to increase substantially. It notes that this traffic is highly time sensitive and requires top quality rail service for these ports to be competitive. WSDOT maintains further that large increases are also projected for grain traffic exported through its ports. It views the reopening of the Stampede Pass route as meeting the growth needs by providing a third corridor across the state.

Both Ports support the application. They note that the BNRR Cascade and Columbia River routes are nearing capacity. Each views the reopening of the Stampede Pass route as being important for increased rail capacity. They contend that the proposal will benefit shippers and improve service. In their view, growth of business at their ports depends on corresponding growth in rail capacity to transport traffic. They see BNSF's acquisition of Washington Central lines as vital to their interest.

NDPSC and ND Grain Producers support the proposal because it would open a new route for grain shipped to Pacific Northwest ports. They state that a lack of capacity has disrupted traffic to the Ports and has delayed the return of empty cars to meet shipper demands. They also note that congestion prevents grain shippers from shipping grain at the most opportune time of high demand and has been costly for producers.

The Cities, while not opposing the merger, express concern about the potential environmental impacts that could result from increased traffic. They have requested that we impose conditions to mitigate these impacts.

Update, a newsletter that deals with rail matters, supports the application. It notes that the Cascade and Columbia River lines are nearing capacity, and that the proposal will enable BNRR to acquire an additional route to handle the predicted growth of traffic in the Pacific Northwest without a large expenditure of capital.

UTU and WA-UTU seek the imposition of employee protective conditions. In addition, WA-UTU asserts that the transaction is not an end-to-end acquisition, but should be considered a parallel transaction, because BNRR will be diverting traffic from other routes.[9] WA-UTU asks that we deny the transaction.

Applicants respond that none of the commenters raise any competitive concerns. They note that many of the commenting parties recognize the benefits to be derived from BNRR's ability to offer a shorter route for certain traffic and, at the same time, reduce congestion of other BNRR routes for time-sensitive traffic.

DISCUSSION AND CONCLUSIONS

Statutory criteria. Under 49 U.S.C. 11323(a)(2), the purchase by rail carriers of property of another rail carrier requires prior approval by the Board. The criteria for approval

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9. WA-UTU also contends that this proceeding should be deferred until CBRC files for authority to lease WCRC lines and acquire trackage rights from BNRR. WA-UTU had previously raised this contention in a petition requesting reopening of the July 17, 1996 procedural decision. We denied WA-UTU's request as unwarranted in the August 12, 1996 decision, and WA-UTU does not present any new reasons in its comments to reconsider our decision.

are set forth in section 11324. Because this transaction does not involve the merger or control of at least two Class I railroads, section 11324(d) governs and requires approval of the application unless the Board finds that:

(1) as a result of the transaction, there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In transactions subject to section 11324(d), the primary focus is on the probable competitive effects. We consider the public interest factor only if we find significant anticompetitive effects. Any adverse competitive impact must be both "likely" and "substantial." Even then, the transaction may not be disapproved unless the anticompetitive impacts outweigh the public interest factors and cannot be mitigated through conditions.[10] *See Wilmington Terminal RR, Inc. — Pur. & Lease — CSX Transp., Inc.*, 6 I.C.C.2d 799, 803 (1990), and cases cited therein, 7 I.C.C.2d 60 (1990), *aff'd sub nom. Railway Labor Executives Ass'n v. I.C.C.*, 930 F.2d 511 (6th Cir. 1991) (*Wilmington Terminal*).

There is nothing on record indicating any anticompetitive effects from this transaction. The WCRC lines to be operated by BNRR service two types of markets: (1) overhead, east-west

10. The quoted language from section 11324(d) is identical to the language in former section 11344(d). Therefore, in interpreting section 11324(d), we are guided by the case law interpreting former section 11344(d).

grain and other traffic between the Pacific Northwest and other regions; and (2) local traffic which originates and terminates on the lines. The only change affecting overhead traffic brought about by the transaction is to open a new route to the Puget Sound area for BNRR. No other carrier is configured to make such use of these lines.

All Washington Central local customers will continue to have the same rail alternatives available today. BNRR will assume existing trackage and haulage rights obligations and will serve shippers on UP's Yakima line. Consequently, these shippers face no loss of transportation alternatives. There is no evidence to indicate a loss of geographic competition, since local access by UP will be maintained. There has been no significant opposition citing competitive concerns. While WA-UTU argued that the application should be denied, it did not submit any evidence showing that the proposed transaction is anticompetitive.

On the other hand, the public benefits from the transaction are substantial. Applicants would realize $15.24 million in annual savings from the rerouting of traffic over the shorter Stampede Pass route. There are also significant unquantified benefits. By reopening the Stampede Pass route, BNRR will relieve capacity constraints on the Cascade route and the Columbia River route.

In developing intermodal service over the Cascade route, BNSF indicates that it wants to replicate the "high quality, time sensitive service" between Chicago and Los Angeles provided now over ATSF lines. Rerouting non-intermodal traffic on to the Stampede Pass route will permit BNSF to provide quality intermodal service on its other lines as that traffic grows.

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Applicants expect grain traffic to grow 7 percent per year to meet export demand. The routing of three loaded and three empty grain trains a day over the Stampede Pass route will result in more efficient handling of grain. Additionally, the Pasco Yard appears better suited for handling grain than the facilities BNRR currently uses.

Based on the evidence before us, we conclude that this transaction not only lacks anticompetitive effects but shows prospects of significant public benefits.

Labor protection. Applicants do not expect that existing BNRR employees or any of its subsidiaries' or affiliates' employees will be adversely affected by the proposed control transaction. They maintain that most Washington Central employees will be absorbed into BNRR after Washington Central's operations are integrated into BNRR. They state that most Washington Central employees will probably continue to perform the same or similar tasks with BNRR. Some work currently performed by Washington Central employees will be transferred to other BNRR locations. For example, Washington Central dispatchers may be retrained for BNRR's Network Operations Center or ATSF's System Operation Center. Employees with mechanical skills may be absorbed at BNRR's other maintenance facilities in the Washington-Montana area.

Applicants anticipate that 17 Washington Central positions will be eliminated in the first year of common control. In addition, some management positions may be transferred or eliminated. They expect no labor impacts in the second and third years after consummation.[11]

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11. Applicants also indicate that CBRC expects to employ at least 15 of WCRC's current employees to operate lines to be acquired from WCRC.

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BNRR will establish a crew district between Pasco and Ellensburg with Pasco being the home terminal. An additional crew district will be established between Ellensburg and Seattle with Seattle being the home terminal. A helper district will also be established between Ellensburg and Eagle Gorge, WA,[12] to help the west-bound merchandise and the loaded grain trains over the Stampede Pass route.

Under 49 U.S.C. 11326(a), with exceptions not pertinent here, when approval is sought for a transaction under sections 11324 and 11325, the imposition of labor protective conditions is mandatory. In the absence of a need for greater protection, the conditions in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), are appropriate for this type of transaction. Because no need for greater protection has been shown, these conditions will be imposed here. This is consistent with the requests of Applicants and UTU.

Applicants state that no employee protection agreements have been reached as yet, but they are negotiating with BNRR's union representatives. Applicants expect to offer transfer or severance packages under the *New York Dock* conditions to Washington Central employees whose positions will be eliminated as a result of this transaction.

Environmental analysis. Under the National Environmental Policy Act (NEPA), an environmental review is required in this proceeding because, after BNRR acquires WCRC's segment of the Stampede Pass route, rail traffic is projected to

12. Applicants indicate that Eagle Gorge is located approximately 74 miles west of Ellensburg on BNRR's segment of the Stampede Pass route between Ellensburg and Auburn.

exceed our thresholds for environmental review at 49 CFR 1105.7(e)(4) and (5). Here, an environmental assessment (EA) was prepared pursuant to 49 CFR 1105.6(b)(4). That section calls for an EA, rather than an Environmental Impact Statement, for proposed mergers which would involve major operational changes that are not expected to result in substantial adverse environmental impacts.

On September 4, 1996, the Section of Environmental Analysis (SEA) issued an EA based on its independent analysis, consultations with appropriate Federal, state and local agencies, a site inspection, and review of all the information submitted to date. The EA analyzed BNRR's proposed operation over the entire Stampede Pass route between Auburn and Pasco, including Washington Central's 151-mile segment between Pasco and Cle Elum and BNRR's 77.9-mile segment between Auburn and Cle Elum (which is not part of this application). Both segments of the Stampede Pass route were included in the environmental analysis because the portion of the line between Auburn and Cle Elum is directly related to the Cle Elum to Pasco portion and is the link between WCRC's Cle Elum to Pasco line and BNRR's existing main line. Moreover, without BNRR's proposed control and operation of WCRC's segment, the Stampede Pass route would presumably remain relatively inactive. However, SEA's analysis of the Auburn to Cle Elum segment was limited to the anticipated impacts of an increase in train traffic on that segment. SEA's environmental review did not consider potential environmental impacts of upgrading or rehabilitating the line because these actions do not require Board approval, and maintenance, even if deemed to be upgrading, is more clearly committed to rail management discretion and less clearly related to the transaction we are approving here. SEA also assessed, and developed mitigating

measures to address potential environmental impacts based on an increase in traffic to the City of Auburn, which is located at the western end of the Stampede Pass line.

As stated above, BNRR plans to operate a total of approximately 10 through trains per day over the Stampede Pass route for the reasonably foreseeable future. In comments to the EA and other documents, BNRR's traffic projections were disputed and assertions were made that BNRR intended to upgrade the Stampede Pass tunnel to accommodate an additional 15-22 trains per day, including double-stack trains. Because of this discrepancy, SEA requested that BNRR submit a verified statement addressing traffic projections on the line following upgrading and modification to any tunnels.

In its verified statement, BNRR reaffirmed that it would move a total of no more than approximately 10 through trains per day over the line for the reasonably foreseeable future and that it had no present plans to improve the tunnel. SEA accepted BNRR's traffic projections of approximately 10 trains per day and assessed the potential environmental impacts based on that figure.

The EA considered impacts on safety, energy, air quality, noise and vibration, land use, water, biological resources and cultural resources. In the EA, SEA concluded that, based on its independent analysis of all available information and a site visit to the area, the proposal would not have significant environmental impacts if the mitigation measures recommended in the EA were imposed and implemented. Further, the EA found that the potential for environmental impact was reduced because the track infrastructure over which these trains would operate already is in place.

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SEA received 23 comments on the EA. In its detailed Post Environmental Assessment (Post EA), dated October 16, 1996, SEA addressed the issues raised in the comments, recommended final mitigation measures, and concluded that if the mitigation recommended in the Post EA were imposed and implemented, the merger proposal would not have significant environmental impacts.[13] We adopt SEA's Post EA conclusions and recommended mitigation measures, including SEA's reliance on the 10 trains per day traffic projections.

SEA's decision to rely on the traffic data submitted by BNRR during the environmental review process is reasonable. The Cities have challenged the EA's use of 10 trains a day as the reasonably foreseeable traffic following the proposed merger. The Cities argue that a likelier result of the merger is that between 15 and 22 trains per day will move over the Stampede Pass route. This argument is based on analysis undertaken by BNSF as to the result of raising the present clearances of the tunnel on the Auburn to Cle Elum portion of the line by 4 feet to permit BNSF to operate trains of containers stacked on top of each other. BNSF, however, submitted a verified statement stating that it has scrapped plans to increase the height of the tunnel at issue for the reasonably foreseeable future. It is uncontroverted that without modification of that tunnel the intermodal traffic will not move over the Stampede Pass route. Given this fact, we have no basis to conclude that traffic is likely to exceed a total of approximately 10 trains a day for the reasonably foreseeable future. In any event, as SEA stated, the same mitigation measures recommended in the Post

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13. The Post EA has been made part of the Board's public record in this case. It is also available upon request by contacting Dana White, Section of Environmental Analysis, Surface Transportation Board, Washington, DC 20423, telephone: (202) 927-6213.

EA would apply equally to a higher level of traffic. Thus, the communities impacted by this merger would be protected even assuming *arguendo* that the level of traffic were to exceed 10 trains per day at some point in the future.

SEA has developed measures designed specifically to mitigate potential impacts to safety, air quality, biological, and water resources. We will adopt the recommended final mitigation measures in the Post EA with minor changes. Our mitigation measures are set forth below:

1. As requested by a number of local authorities on the Cle Elum to Pasco segment, BNRR shall notify town and county governments along that line segment, as well as towns and counties along the Auburn to Cle Elum line segment, of its expected schedule of merchandise train operations, as soon as BNRR formulates such a schedule. Because of the seasonal nature of grain, however, BNRR shall provide reasonable notice to these same town and county governments of generally expected times of grain train movements.

2. BNRR shall provide all local and county governments along the Stampede Pass route with copies of all applicable Emergency Response Plans and, upon request, provide training of local emergency response personnel for coordinated responses to incidents. In the case of a hazardous material incident, BNRR shall follow appropriate emergency response procedures contained in its Emergency Response Plans.

3. BNRR shall provide 800 numbers to all emergency response forces in all towns and counties. These numbers

shall provide access to BNRR supervisors who shall provide train movement information and work cooperatively with communities in emergency situations. These numbers are not to be disclosed to the general public.

4. BNRR shall transport all hazardous materials in compliance with U.S. Department of Transportation Hazardous Materials Regulations (49 CFR Parts 171 to 180).

5. BNRR shall consult with the State of Washington and appropriate local officials to develop a priority list and discuss funding options for upgrading crossing signals, where necessary, due to increases in rail traffic resulting from the proposed transaction. BNRR shall include in these consultations representatives from the Regional Office of the Federal Railroad Administration in Vancouver, WA. BNRR shall advise SEA as to the status and the results of these consultations.

6. To the extent possible, BNRR shall space train movements to allow time for grade crossings to clear.

7. To the extent practicable, BNRR shall apply operating practices that are designed to reduce locomotive fuel consumption and air pollution: avoidance of unnecessary locomotive idling; use of optimal locomotive power settings to decrease emissions; avoidance of high-throttle setting acceleration; isolation of unneeded horsepower; and closing of box car doors on empty cars.

8. Within 30 days of the effective date of this decision, BNRR shall consult with the Washington Department of Fish and Wildlife to facilitate:

(a) maximum protection of the Yakima and Green Rivers, including development of a spill and containment response plan specifically tailored to the Yakima and Green Rivers;

(b) vegetation control along the right-of-way as a means of fire-suppression management;

(c) wildlife movement and access to water;

(d) the minimizing of adverse impacts on wildlife and protection of water quality associated with any use of herbicides in aquatic areas;

(e) provision, placement and maintenance of fire suppression vehicles during the dry season from April to November in the Yakima Canyon area.

BNRR shall provide a written status report to SEA on the results of these consultations.

9. BNRR shall make every effort to prevent causing fires, and to contain and control any fire it might cause, and shall immediately report all such fires to the appropriate fire-fighting organization.

10. BNRR shall apply only herbicides registered with the U.S. Environmental Protection Agency for use in aquatic sites and these herbicides shall be applied by licensed herbicide contractors.

11. For safety purposes, BNRR shall install and maintain, if requested, protective fencing where recreation areas, or

other similar public use areas, are located adjacent to the right-of-way.

12. To facilitate communication between local government authorities and BNRR, BNRR shall designate a representative (with a toll free number) to provide general assistance such as handling inquiries, providing train movement information, and responding to reports of malfunctioning signaling systems, etc.

13. Prior to the initiation of operations along any part of the Stampede Pass route, BNRR shall consult with appropriate state and local highway authorities to identify those grade crossings along the route where temporary signs should be posted by BNRR in order to alert motorists as to when reinstitution/increased rail traffic will begin.

Based on the record, we find:

1. The proposed transaction will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation.

2. As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

3. As conditioned, this action will not have any significant adverse effect on employees of either BNRR or Washington Central.

It is ordered:

1. The application under 49 U.S.C. 11323, *et seq.*, for BNSF to continue in control of BNSF Acquisition, after BNSF Acquisition acquires the common stock and subsequently merges with Washington Central, and for BNRR to operate the above-described Washington Central lines, is approved, subject to the employee protection conditions described in *New York Dock Ry. — Control — Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), and the environmental conditions set out in this decision.

2. This decision is effective October 30, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 22, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-71051, 97-70022
97-70920

CITY OF AUBURN, a Municipal Corporation of the State of Washington, et al.,

Petitioners,

vs.

SURFACE TRANSPORTATION BOARD, et al.,

Respondents,

and

BURLINGTON NORTHERN SANTA FE CORPORATION, et al,

Intervenors,

ORDER

Before: LAY*, GOODWIN, and PREGERSON, Circuit Judges

* Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix E

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Pregerson voted to reject the suggestion for rehearing en banc and Judges Lay and Goodwin so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F — RELEVANT STATUTES

49 U.S.C. § 10101

§ 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government —

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

(Added Pub.L. 104-88, Title I, § 102(a), Dec. 29, 1995, 109 Stat. 805.)

Appendix F

49 U.S.C. § 10102

§ 10102. Definitions

In this part —

(1) "Board" means the Surface Transportation Board;

(2) "car service" includes (A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier;

(3) "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means;

(4) "person", in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person;

(5) "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;

(6) "railroad" includes —

(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;

(B) the road used by a rail carrier and owned by it or operated under an agreement; and

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;

(7) "rate" means a rate or charge for transportation;

(8) "State" means a State of the United States and the District of Columbia;

(9) "transportation" includes —

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property; and

(10) "United States" means the States of the United States and the District of Columbia.

(Added Pub.L. 104-88, Title I, § 102(a), Dec. 29, 1995, 109 Stat. 806.)

Appendix F

49 U.S.C. § 10501

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is —

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in —

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over —

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c)(1) In this subsection —

(A) the term "local governmental authority" —

(i) has the same meaning given that term by section 5302(a) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "mass transportation" means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to —

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before the effective date of the ICC Termination Act of 1995. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

(Added Pub.L. 104-88, Title I, § 102(a), Dec. 29, 1995, 109 Stat. 807.)

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49 U.S.C. § 10901

§ 10901. Authorizing construction and operation of railroad lines

(a) A person may —

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) provide transportation over, or by means of, an extended or additional railroad line; or

(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line.

only if the Board issues a certificate authorizing such activity under subsection (c).

49 U.S.C. § 11321

§ 11321. Scope of authority

(a) The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person

participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its powers under its corporate charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

(Added Pub.L. 104-88, Title I, § 102(a), Dec. 29, 1995, 109 Stat. 838.)

49 U.S.C. § 11323

§ 11323. Consolidation, merger, and acquisition of control

(a) The following transactions involving rail carriers providing transportation subject to the jurisdiction of the

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Board under this part may be carried out only with the approval and authorization of the Board:

(1) Consolidation or merger of the properties or franchises of at least 2 rail carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) A purchase, lease, or contract to operate property of another rail carrier by any number of rail carriers.

(3) Acquisition of control of a rail carrier by any number of rail carriers.

(4) Acquisition of control of at least 2 rail carriers by a person that is not a rail carrier.

(5) Acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers.

(6) Acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those rail carriers, regardless of how that result is reached, only with the approval and authorization of the Board

under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a rail carrier that has the effect of putting that rail carrier and person affiliated with it, taken together, in control of another rail carrier.

(2) A transaction by a person affiliated with a rail carrier that has the effect of putting that rail carrier and persons affiliated with it, taken together, in control of another rail carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a rail carrier or is affiliated with a rail carrier) that has the effect of putting those persons and rail carriers and persons affiliated with any of them, or with any of those affiliated rail carriers, taken together, in control of another rail carrier.

(c) A person is affiliated with a rail carrier under this subchapter if, because of the relationship between that person and a rail carrier, it is reasonable to believe that the affairs of another rail carrier, control of which may be acquired by that person, will be managed in the interest of the other rail carrier.

(Added Pub.L. 104-88, Title I, § 102(a), Dec. 29, 1995, 109 Stat. 838.)

* * *

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49 U.S.C. § 11325

§ 11325. Consolidation, merger, and acquisition of control: procedure

(a) The Board shall publish notice of the application under section 11324 in the Federal Register by the end of the 30th day after the application is filed with the Board. However, if the application is incomplete, the Board shall reject it by the end of that period. The order of rejection is a final action of the Board. The published notice shall indicate whether the application involves —

(1) the merger or control of at least two Class I railroads, as defined by the Board, to be decided within the time limits specified in subsection (b) of this section;

(2) transactions of regional or national transportation significance, to be decided within the time limits specified in subsection (c) of this section; or

(3) any other transaction covered by this section, to be decided within the time limits specified in subsection (d) of this section.

(b) If the application involves the merger or control of two or more Class I railroads, as defined by the Board, the following conditions apply:

(1) Written comments about an application may be filed with the Board within 45 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the

Attorney General and the Secretary of Transportation, who may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Board by the end of the 15th day after the date of receipt of the written comments.

(2) The Board shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it by the 90th day after publication of notice under that subsection.

(3) The Board must conclude evidentiary proceedings by the end of 1 year after the date of publication of notice under subsection (a) of this section. The Board must issue a final decision by the 90th day after the date on which it concludes the evidentiary proceedings.

(c) If the application involves a transaction other than the merger or control of at least two Class I railroads, as defined by the Board, which the Board has determined to be of regional or national transportation significance, the following conditions apply:

(1) Written comments about an application, including comments of the Attorney General and the Secretary of Transportation, may be filed with the Board within 30 days after notice of the application is published under subsection (a) of this section.

(2) The Board shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it by the 60th day after publication of notice under that subsection.

(3) The Board must conclude any evidentiary proceedings by the 180th day after the day of publication of notice under subsection (a) of this section. The Board must issue a final decision by the 90th day after the date on which it concludes the evidentiary proceedings.

(d) For all applications under this section other than those specified in subsections (b) and (c) of this section, the following conditions apply:

(1) Written comments about an application, including comments of the Attorney General and the Secretary of Transportation, may be filed with the Board within 30 days after notice of the application is published under subsection (a) of this section.

(2) The Board must conclude any evidentiary proceedings by the 105th day after the date of publication of notice under subsection (a) of this section. The Board must issue a final decision by the 45th day after the date on which it concludes the evidentiary proceedings.

(Added Pub.L. 104-88, Title I, § 102(a), Dec. 29, 1995, 109 Stat. 841.)

* * * *

APPENDIX G — LETTER FROM ERIC LASCHEVER TO PAUL KRAUSS DATED MARCH 24, 1997 RE: WITHDRAWAL OF COMPREHENSIVE PLAN AMENDMENT REQUEST

PGE

PRESTON GATES & ELLIS LLP
ATTORNEYS

March 24, 1997

Paul Krauss
Planning Director
City of Auburn
25 West Main
Auburn, WA 98001-4998

Re: Withdrawal of Comprehensive Plan Amendment Request

Dear Paul:

I am writing on behalf of The Burlington Northern and Santa Fe Railway Company, (BNSF), to withdraw the application to develop a special area plan for the Auburn rail facility. As you know, BNSF has deferred a decision on developing an intermodal facility at Auburn. In addition, the Surface Transportation Board has ruled that federal law broadly preempts local plans and regulations over rail facilities. For these reasons, BNSF formally withdraws its application to develop a special area plan for the Auburn rail facility. Please confirm your receipt of this notice of withdrawal.

Appendix G

Very truly yours,

PRESTON GATES & ELLIS LLP

By s/ Eric Laschever
Eric Laschever

EL:esl

APPENDIX H — LETTER OF THE ATTORNEY GENERAL OF WASHINGTON DATED OCTOBER 27, 1998

Christine O. Gregoire
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 •
Olympia WA 98504-0100

October 27, 1998

Ms. Cathy A. Catterson, Clerk
United States Court of Appeals for the Ninth Circuit
P. O. Box 193939
San Francisco, CA 94119-3939

RE: City of Auburn's Petition for Rehearing and Suggestion for Rehearing en Banc, *City of Auburn v. United States Government, et al.*, Nos. 96-71051, 97-70022, and 97-70920

Dear Ms. Catterson:

Pursuant to Circuit Advisory Committee Note to Rule 29-1, the State of Washington — as Amicus — files and serves on all parties this short letter joining in the arguments of the City of Auburn. The State of Washington strongly supports the City of Auburn's Petition for Rehearing and Suggestion for Rehearing en Banc. The State believes that clarification is needed regarding the issue of whether the Interstate Commerce Commission Termination Act ("ICCTA") preempts state environmental permitting laws affecting railroad operations which are not monitored or regulated by the Surface Transportation Board (STB).

This opinion, absent a modification, will affect the ability of the State to use permitting processes within state environmental laws to ensure proper environmental protection by railroads. As a concrete example of this, on September 3, 1998, the Washington Department of Fish and Wildlife (WDFW) issued a citation to Burlington Northern and Santa Fe Railway Company (BNSF) for violating the State Hydraulic Code, Wash. Rev. Code § 75.20.100, in Chelan County, Washington. This citation was based upon BNSF's failure to obtain a hydraulic project approval (HPA) prior to repairing a railroad bridge post on the Wenatchee River. BNSF allegedly poured cement directly in the river, destroyed riparian habitat, and left debris at the site location. Based upon a WDFW fishery biologist's professional opinion, fish kills occurred at the site due to BNSF's activities (although no dead fish were observed). Had BNSF sought an HPA from the Department prior to conducting the maintenance activity, the Department would have issued an HPA with conditions which ensured proper protection of fish life.

After receiving the citation, BNSF asserted — based upon the Ninth Circuit's Opinion — that federal law preempted the state's Hydraulic Code. Based upon the Ninth Circuit's Opinion as well as BNSF's commitment to restore the site and perform mitigation, WDFW withdrew the citation.

The State of Washington notes that the Court's Opinion is inconsistent with arguments of the Respondents Surface Transportation Board and United States of America. *See* Joint Brief of Respondents Surface Transportation Board and United States of America, pp. 41-48. The State of Washington also notes that the Court's opinion is inconsistent with

arguments of the Respondent BNSF. *See* Brief of Respondent The Burlington Northern and Santa Fe Railway Company, pp. 36-37.

Sincerely,

s/ Matthew A. Love
MATTHEW A. LOVE
Assistant Attorney General

s/ Neil Wise
NEIL WISE
Assistant Attorney General

cc: All parties